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*Index*  
REPORTS OF CASES

DECIDED IN THE

APPELLATE COURTS

OF THE

STATE OF ILLINOIS *26*

AT THE MARCH TERM, 1896, AND THE OCTOBER TERM, 1895, OF THE FIRST  
DISTRICT; THE AUGUST TERM, 1895, OF THE FOURTH  
DISTRICT, AND THE MAY TERM, 1895,  
OF THE THIRD DISTRICT.

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VOL. LXIII.

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REPORTED BY  
MARTIN L. NEWELL  
OF THE SPRINGFIELD BAR

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1896

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# THE APPELLATE COURTS OF ILLINOIS

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These Courts are held by Judges of the Circuit Courts assigned by the Supreme Court for a term of three years. One Clerk is elected in each district.

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MARTIN L. NEWELL, Reporter, Springfield, Illinois.

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## FIRST DISTRICT.

Composed of the county of Cook.  
Court sits at Chicago on the first Tuesdays of March and October.  
CLERK—Thomas G. McElligott, Ashland Block.

### JUSTICES.

JOSEPH E. GARY, Ashland Block, Chicago.  
ARBA N. WATERMAN, " " "  
HENRY M. SHEPARD, " " "

## SECOND DISTRICT.

Composed of the Northern Grand Division of the Supreme Court,  
except Cook county.  
Court sits at Ottawa, LaSalle county, on the third Tuesday in May,  
and the first Tuesday in December.  
CLERK—Columbus C. Duffy, Ottawa, LaSalle county.

### JUSTICES.

LYMAN LACEY, Havana, Mason county.  
OLIVER A. HARKER, Carbondale, Jackson county.  
JOHN D. CRABTREE, Oregon, Ogle county.

## THIRD DISTRICT.

Composed of the Central Grand Division of the Supreme Court.  
Court sits at Springfield, Sangamon county, on the third Tuesdays  
in May and November.  
CLERK—George W. Jones, Springfield, Sangamon county.

### JUSTICES.

GEORGE W. PLEASANTS, Rock Island, Rock Island county.  
GEORGE W. WALL, DuQuoin, Perry county.  
CARROLL C. BOGGS, Fairfield, Wayne county.

## FOURTH DISTRICT.

Composed of the Southern Grand Division of the Supreme Court.  
Court sits at Mount Vernon, Jefferson county, on the fourth Tues-  
days in February and August.  
CLERK—John W. Burton, Mount Vernon, Jefferson county.

### JUSTICES.

NATHANIEL W. GREEN, Pekin, Tazewell county.  
CHARLES J. SCOFIELD, Carthage, Hancock county.  
ALFRED SAMPLE, Paxton, Ford county.



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# CASES

## IN THE

# APPELLATE COURTS OF ILLINOIS.

FIRST DISTRICT—OCTOBER TERM, 1895.

Francis M. Bacon et al. v. Schepflin, Schultz & Co.

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1. **PLEADING**—*Where the Defendant is Sued by a Wrong Name.*—Where a defendant is sued by a wrong name in an ordinary action, if he pleads, whether in abatement or in bar, he must not commence his plea with an assumption that he has been before mentioned in the case. If he does so, his plea will be bad on demurrer.

2. **SAME**—*Premature Bringing of an Action.*—The premature bringing of an action may be pleaded in abatement.

**Attachment.**—Appeal from the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Heard in this court at the October term, 1895. Reversed and remanded. Opinion filed March 3, 1896.

MOSES, PAM & KENNEDY, attorneys for appellants.

Pleas in abatement are treated strictly.

The improper entitling of the plea in abatement is cause for demurrer. *Holloway v. Freeman*, 22 Ill. 197; *Gould on Pleading*, 432, Sec. 12; 1 *Chitty, Pleading*, 465-6.

SMITH, SHEDD & UNDERWOOD, attorneys for appellees.

The premature bringing of a suit is ground for a plea in abatement. *Collins v. Montemy*, 3 Ill. App. 184; 1 *Chitty Pleading* (16th Am. Ed.), 469; 1 *Encyc. Pleading and Prac-*

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Bacon v. Schepflin, Schultz &amp; Co.

tice, 22; Collette v. Weed, 68 Wis. 428; Smith v. Holmes, 19 N. Y. 271; Pitts v. Bank, 121 Ill. 586.

Pleas in abatement are strictly, but not prohibitively, construed. Holloway v. Freeman, 22 Ill. 197; Fowler v. Arnold, 25 Ill. 284; Cook v. Yarwood, 41 Ill. 118.

After the overruling of plaintiff's demurrer to a plea in abatement, the court can not permit plaintiff to reply to the plea, but judgment that the writ be quashed must be given. Spaulding v. Lowe, 58 Ill. 96; Eddy v. Brady, 16 Ill. 306; Ridgeway v. Smith, 17 Ill. 34; 1 Chitty's Pleading, star page 483; Gould's Pleading, p. 277, Sec. 159; Stephen's Pleading, 107; Motherell v. Beaver, 2 Gil. 69; McKinstry v. Pennoyer, 1 Scam. 319.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellants commenced a suit in attachment against the appellees by their partnership name, as the statute permits.

To that a plea was filed as follows:

"STATE OF ILLINOIS, }  
County of Cook. } ss. In the Superior Court of Cook  
County, April term, A. D. 1895.

Francis M. Bacon, Francis M. Bacon, Jr., and James F. Bacon, plaintiffs,	}	Attachment.
vs.		
Christian Schepflin and Peter Schultz, co-partners as Schepflin, Schultz & Co., defendants.		

And the said Christian Schepflin and Peter Schultz, defendants, by Smith, Shedd & Underwood, their attorneys, come and defend, etc., and pray judgment of said writ, because they say that at the time of suing out the writ of attachment herein, and of the beginning of said writ, there was no sum of money due or payable from said defendants, or either of them, to said plaintiffs, or either of them, on account of the several supposed promises in said declaration of said plaintiffs mentioned, or for or on account of any other matter or thing whatsoever, and that said several



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Bacon v. Schepflin, Schultz & Co.

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supposed sums of money and each of them, in said declaration alleged to have been promised by said defendants to said plaintiffs, will become due and payable from said defendants to said plaintiffs on the 6th day of June, 1895, and not prior thereto, and this they, the said Christian Schepflin and Peter Schultz, are ready to verify; wherefore they pray judgment of said writ and that the same may be quashed, etc.

SMITH, SHEDD & UNDERWOOD,  
Attorneys for Defendants."

The appellants demurred, assigning as one of the causes: "Said plea is not a plea by the defendants in said cause."

That the premature bringing of an action may be pleaded in abatement is not questioned. *Pitts Sons' Mfg. Co. v. Commercial Nat. Bk.*, 121 Ill. 582.

Neither by briefs of counsel nor our own research, do we find that the text book writers had any knowledge of attachments against defendants by other than their individual names.

We must determine from the purpose of pleadings, and from analogy, whether this plea is good.

Considering the quoted cause assigned, the case most nearly resembles that of a defendant sued by a wrong name in an ordinary action, in which case, if he pleads, whether in abatement or in bar, he must not commence his plea with an assumption that he has been before mentioned in the case. 1 Ch. Pl., Ed. 1828, 468.

If he does, his plea is bad on demurrer.

Now that is what has been done here.

The plea should have commenced: "And Christian Schepflin and Peter Schultz, against whom the said Francis M. Bacon, Francis M. Bacon, Jr., and James F. Bacon have sued out a writ of attachment by the name of Schepflin, Schultz & Co."

The demurrer should have been sustained with judgment that the defendants answer over. 1 Ch. Pl., 405, same Ed.

The judgment is reversed and the cause remanded.

**Andrew M. Mangson v. John A. Hedin.**

1. **BILL OF EXCEPTIONS**.—*Fails to Show that it Contains all the Evidence.*—Where a bill of exceptions fails to show that it contains all the evidence, the court will presume that there was sufficient evidence not shown by the bill to justify the finding and judgment of the court below.

**Assumpsit**, on contract for hiring. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the October term, 1895. Affirmed. Opinion filed March 3, 1896.

WICKERSHAM & HAYNER, attorneys for appellant.

WILLIAM A. DOYLE, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

In this case appellee contended that on January 15, 1891, appellant employed him to act as foreman of appellant's planing mill, at a salary of \$1,300 per year; that appellee continued to work for appellant until August 19, 1891, when appellant, as appellee claims, without just cause, wrongfully discharged him. Appellee declared specially upon the foregoing contract, and filed, also, the common counts. To this declaration appellant pleaded the general issue and two special pleas, one being a plea of set-off and the other setting up a judgment entered in the justice court of James M. Doyle, in a case between the parties to this suit, and alleging the cause of action in the justice court is the same as the cause of action in the present case.

The bill of exceptions fails to show that it contains all the evidence presented upon the trial. It is therefore to be presumed that there was evidence not shown by the bill of exceptions which justifies the finding and judgment.

The judgment of the Circuit Court is affirmed.

**Isaac Reynolds v. Derby Cycle Company.**

1. TRIAL—*By the Court, When Conclusive.*—A finding and judgment upon contradictory evidence will not be disturbed.

Assumpsit, goods sold and delivered. Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the October term, 1895. Affirmed. Opinion filed March 3, 1896.

STATEMENT OF THE CASE.

This is an action of assumpsit brought by appellee against appellant in the Circuit Court of Cook County to recover an amount alleged to be due from appellant to appellee for certain merchandise (chiefly bicycles), claimed to have been sold and delivered by appellee to appellant. Appellee filed a declaration consisting of the common counts, also a bill of particulars.

Appellant filed the plea of the general issue, accompanied by affidavits of merits. Appellee then filed a *similiter*. The cause was subsequently, by agreement of the parties, submitted to the court and tried (without a jury) before one of the judges of said Circuit Court, who, after hearing the evidence and the arguments of counsel, found the issues for appellee, assessed its damages at \$739.40, and, after overruling appellant's motion for a new trial, rendered judgment in favor of appellee and against appellant for said sum of \$739.40, to reverse which judgment this case is now presented to this court on appeal.

RICHARDS & ADDINGTON, attorneys for appellant.

ALFRED D. EDDY, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Only a question of fact is involved in this appeal. The

evidence is contradictory, and there is no such preponderance thereof as warrants our reversing the finding and judgment of the court below. The judgment of the Circuit Court is therefore affirmed.

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**C. H. Fargo & Co. v. Laban B. Dixon.**

1. INSTRUCTIONS—*Singling Out Solitary Facts*.—An instruction which singles out from the evidence a solitary fact and calls the attention of the jury to it, is erroneous.

2. JURY—*Province of, in Considering Evidence*.—A jury should be left to take into consideration all the evidence in the case, whether positive, or fairly inferential from what is certain, and it is error to take from their consideration the right to pass upon all the facts and circumstances proved.

**Assumpsit.**—Architect's services. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the October term, 1895. Reversed and remanded. Opinion filed March 3, 1896.

CRAFTY BROS., MACLAREN, JARVIS & CLEVELAND, attorneys for appellant.

W. A. SHERIDAN, attorney for appellee.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellee recovered a judgment below against the appellant corporation for \$450, for making a set of plans and specifications and obtaining estimates on the same, for a shoe factory at Dixon, Illinois.

It seems that the city of Dixon appropriated \$27,500 for the erection of the factory of appellant at that place, and there was evidence tending to show that appellant did not intend to put any more money into the plant than the sum so appropriated, and that appellee was informed of the fact before he began work on the plans and specifications. He

admits that he knew of the amount of the appropriation, but denies that he was informed of the appellant's intention to build and equip the factory within that sum, until after the work for which suit was brought had been done by him. He did, however, agree to prepare plans and specifications, and superintend the construction of the building, as a compensation to himself of three per cent on the whole cost of the building and its equipment.

Acting under such agreement he prepared the plans and specifications in question, and took bids for the work.

The bids for the building alone, considerably exceeded the sum appropriated, and those plans and specifications had to be abandoned.

Appellee admits in his testimony that he was then informed that the appropriation of \$27,500 must build and equip the factory ready for occupancy.

Other plans and specifications were then prepared, and under them the proposed work was done, and appellee was paid in full at the agreed rate of three per cent upon the cost of doing it.

The claim sued and recovered upon was for the first set of plans and specifications, and the sum recovered was at the rate of one and a half per cent on the amount of the bids of \$30,000 that were received for putting up the building alone.

The judgment having to be reversed because of an erroneous instruction to the jury given for appellee, we refrain from all comment upon the merits of the controversy.

In behalf of appellee the jury were given the following instruction :

"The jury are instructed that where a party orders services to be performed, and they are performed, then the law presumes that the party so ordering will pay a reasonable compensation for such services, in the absence of express agreement; hence, if the jury believe from the evidence that the defendant ordered Dixon to do the work for which he seeks to recover compensation in this case, that Dixon did the work as ordered, and has not yet been paid for the same,

then the jury are further instructed that they will find the issues for the plaintiff, and assess his damages at what they believe he is entitled to from the evidence; provided the jury believe from the evidence that Dixon was not told on the start that the building must be erected for \$27,500."

The contract was an oral one, and it was in dispute between the parties as to its precise extent, whether it fairly included the work in question or not. Aside from what witnesses may have testified on either side as to its exact scope, the jury, properly instructed, should have been left to consider all the circumstances surrounding what was said and done by the parties in order to decide what the contract was. What the contract really was, comprised the actual controversy in the case. The contention was not so much directed to what would be owing to appellee if the contract were as he claimed, as that the contract itself was not what he claimed it to be.

And what the contract truly was could only fairly be ascertained by considering the implications that naturally arose from all the facts and proved circumstances surrounding the transaction, in connection with what was expressed. The question was not one of law, but of fact, to be gathered from all the evidence in the case. To single out, therefore, from all the evidence a solitary fact and tell the jury that if they found if appellee "was not told on the start that the building must be erected for \$27,500," then as a matter of law the issues should be found in his favor, was clearly erroneous, and must necessarily have operated prejudicially to the appellant.

The jury should have been left to take into consideration all the evidence there was in the case, whether positive, or fairly inferential from what was certain. It was a fair question for the jury to decide from what was said and the reasonable implications and inferences to be drawn therefrom, and from the circumstances surrounding the parties, whether the contract of the parties included the making of all the plans and specifications which might be necessary to secure a building suited to the contemplation and means of appellant, or only such as might be finally adopted and used.

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Neagle v. Sprague.

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It was error, therefore, to take from the consideration of the jury, as was done by the instruction quoted, the right to pass upon all the facts and circumstances proved, and the judgment is accordingly reversed and the cause remanded.

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**Francis C. Neagle v. William Sprague et al.**

63	25
66	499

1. *NOTICE—Of Acceptance of Guaranty.*—Where a guarantor would know from the nature of the transaction, that his offer of guaranty would be accepted, notice to him of an acceptance is unnecessary.

2. *SAME—When Necessary.*—Where a proposition is made by one party to guarantee the payment to another, if he will sell goods to a third party, notice of acceptance of the proposition is necessary to create the contract of guaranty.

**Assumpsit.**—Contract of guaranty. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the October term, 1895. Affirmed. Opinion filed March 3, 1896.

F. P. REYNOLDS, attorney for appellant.

WOLSELEY & HEATH, attorneys for appellees, contended that it is only where the guarantor would not know from the nature of the transaction, whether the offer has been accepted or not that notice should be given. Bishop v. Eaton (Mass.), 37 N. E. Rep. 665.

We may well repeat the words of the court in Smith v. Dunn, 6 Hill, 543:

“But here the understanding was absolute, and the defendant said to the plaintiff in substance, ‘If you deliver the goods I will guarantee the payment.’ We could not add a condition that the defendant shall have notice. He should have provided for that himself in the proposal made to the plaintiffs.”

As in Wright v. Griffith, 121 Ind. 478, 23 N. E. Rep. 281: “The letter was not a mere overture or proposition; it was the final consummation of a pending arrangement.”

Where the terms of a guaranty impart an intention on the part of the guarantor to be bound by it on delivery, it is not a mere proposal of guaranty, and notice of its acceptance by the guarantees is not necessary. *Johnson v. Bailey*, 15 S. W. Rep. 499; *Lemp v. Armengol*, 86 Tex. 690.

If a contingent guarantor recognizes a prior guaranty and promises to make it good, it is a waiver of notice of acceptance. *Wadsworth v. Allen*, 8 Gratt. 174; *Farwell v. Sully*, 38 Iowa 387; *Central Savings Bank v. Shine*, 48 Mo. 456; *Trefethen v. Locke*, 16 La. Ann. 19.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This suit, originally begun before a justice of the peace, has come here by appeal from a judgment of the Circuit Court for the same amount that was recovered before the justice.

The recovery was had upon a contract of guaranty evidenced by the following paper:

"September 2d, 1893.

F. C. Neagle & Son :

GENTLEMEN: We received your telephone message to deliver a certain bill of glass to A. W. Hack & Co., and that you would be responsible for the same. If you desire us to deliver further goods to this firm, and desire to guarantee the payment, will you give us a letter to that effect, as telephone messages are not, as a rule, satisfactory?

Yours truly,

SPRAGUE, SMITH & Co."

"September 5, 1893.

Please let the above firm have what they want for the present month, and we will guarantee the payment of same.

F. C. NEAGLE & SON.

N. B. I will send you a check for the balance we, F. C. Neagle & Son, owe you this week, \$141."

In pursuance of such guaranty, goods, consisting of glass to the amount of \$211.70, were afterward, and in September,



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1895, delivered by the appellees to A. W. Hack & Co., and \$100 was paid on account thereof.

On the trial in the Circuit Court the suit was dismissed as to John F. Neagle, who was the "son" in the firm of F. C. Neagle & Son, and judgment was rendered against the appellant Francis C. Neagle alone, for the balance of \$111.70.

The point is made that no notice of acceptance of the guaranty was given to appellant. We do not think any other notice was necessary than that which is embodied in the proposition of appellees, which was in substance that they would sell if appellant would guarantee, and to which appellant replied he would guarantee. There was a complete meeting of minds, and all that was needed to constitute a complete contract; anything more would have been superfluous. *Cooke v. Orne*, 37 Ill. 186.

Where a guarantor would know from the nature of the transaction that his offer of guaranty would be accepted, notice to him of acceptance is not required. *Bishop v. Eaton*, 161 Mass. 496; *Wright v. Griffith*, 121 Ind. 478; *Lemp v. Armengol*, 86 Tex. 690; *Smith v. Dann*, 6 Hill 543.

Had it been a proposition from appellant to guarantee if appellees would sell, notice of acceptance would have been required, to create the necessary meeting of minds. *Ruffner v. Love*, 33 Ill. App. 601.

But, as we have seen, such was not the character of this transaction.

We do not regard the case of *Newman v. Streator Coal Co.*, 19 Ill. App. 594, which is relied upon by appellant, as being in point.

The other points presented in argument do not seem to require notice further than to say that, with unimportant exceptions, they were all settled by the verdict of the jury.

The judgment of the Circuit Court is affirmed.

63	28
98	1454

**Brewer & Hoffman Brewing Co. v. Mary A. Lonergan,  
Executrix, etc.**

1. **AFFIDAVIT**—*To State Facts and Not Conclusions of Law.*—An affidavit read upon a motion to set aside a default on the ground that the party defaulted had a meritorious defense to the action, should state the facts relating to such defense and not conclusions of law.

**Motion to Set Aside a Default.**—Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the October term, 1895. Affirmed. Opinion filed March 3, 1896.

M. M. JACOBS, attorney for appellant.

It has been the uniform practice of this court and of the Supreme Court, to open an *ex parte* judgment, when to permit it to stand would be unjust and oppressive, if the defendant has shown reasonable diligence to avoid the effects of a default. *Union Hide & Leather Co. v. Woodley*, 75 Ill. 435.

Where it appears by affidavit that the defendant has a meritorious defense to the merits, it is usual to set aside a default at the term at which it is entered if a reasonable excuse is shown for not having made the defense, and in such case the point of having a meritorious defense is altogether the more important of the two required. *Slack v. Casey*, 22 Ill. App. 412.

GEO. A. DUPUY, attorney for appellee.

A motion to set aside a default is addressed to the sound, legal discretion of the court, and unless it appears that the discretion has been wrongfully and oppressively exercised, this court, on appeal, will not interfere. *Greenleaf v. Roe*, 17 Ill. 474; *Scales v. Labar*, 51 Ill. 232.

But if appellant has been free from negligence, the court is not bound to set aside the default, unless it appears that he has a meritorious defense to the action. *Constantine v.*

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Brewer & Hoffman Brewing Co. v. Lonergan.

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Wells, 83 Ill. 192; Hitchcock v. Herzer, 90 Ill. 543; Slack v. Casey, 22 Ill. App. 412.

An application to set aside a default should show a meritorious defense, and a reasonable excuse for not having made that defense in due time. It is only where it is evident the action of the court below has been unjust and oppressive, and has resulted in a substantial injury to the appellant, that such action will be reversed on review. Greenleaf v. Roe, 17 Ill. 474; Union Hide and Leather Co. v. Woodley, 75 Ill. 436; Constantine v. Wells, 83 Ill. 192.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The abstract does not tell us what this case is about. All that we learn of the pleadings is, "plea of general issue and *ultra vires* of defendant," but in what kind of an action, is undisclosed.

The appellant complains that the appellee tried the cause *ex parte* and took judgment by unfair dealing of the appellee's attorney. The attorney of the appellant put in an affidavit which states "that he is acquainted with all the facts in this cause, and knows that the defendant has a good and meritorious defense to the entire claim of the plaintiff; that the defense is purely one of law, the defendant having filed a plea of *ultra vires*."

Attorneys have been mistaken sometimes as to the validity of such defenses. Northwestern Brewing Company v. Marion, 44 Ill. App. 424.

It is unsafe to swear to the law. Jones v. Randall, Cowper 37.

No facts were set out that the court might determine whether there was a defense. Bigelow v. Village of Kewanee, 17 Ill. App. 631.

The judgment is affirmed.

**Carl C. Bullock v. Ada Adair.**

1. **INN KEEPERS**—*A European Hotel May be an Inn.*—A European hotel with rooms and cafe attached, and claiming the benefit of the act for the protection of inn keepers, may be an inn, and as such be liable for loss of goods by its guests.

**Assumpsit**, by a guest, for loss of goods. Appeal from the Superior Court of Cook County; the Hon. Henry V. Freeman, Judge, presiding. Heard in this court at the October term, 1895. Affirmed. Opinion filed March 3, 1896.

KEENE H. ADDINGTON, attorney for appellant.

We hold it as fundamental that a "common inn," even though ordinarily such, may likewise sustain toward different characters; that at one and the same time it may be inn, boarding-house and lodging house; in other words, that in determining the true character of any such establishment, the question is one of fact to be decided upon a consideration of the circumstances surrounding, and the contract between the parties to the contention. In the case of *Seward v. Seymour*, Anthon's Law Student, 53, cited in *Cromwell v. Stephens*, 2 Daly (N. Y.) 23, it is said:

"The Atlantic hotel has a double character. It is a boarding-house and also an inn."

To like effect will be found *Hall v. Pike*, 100 Mass. 497.

The Supreme Court of this State in the case of *Pullman Palace Car Company v. Smith*, 73 Ill. 363, has committed itself to the following definition of an inn: "It must be a house kept open publicly for the lodging and entertainment of travelers in general, for a reasonable consideration. If a person lets lodgings only, and upon a previous contract with every person who comes, and does not afford entertainment for the public at large, indiscriminately, it is not a common inn." 2 Kent's Com., 495; *Curtis v. Murphy*, 63 Wis. 6.

Whether appellee comes within the legal definition of a guest is a question of fact, to be decided upon all the evi-

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Bullock v. Adair.

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dence. In the absence of a specific agreement, its correct decision requires a consideration of the situation of the parties and all the circumstances. The duration of the plaintiff's stay, the price paid, the amount of accommodation afforded, the transient or permanent character of the plaintiff's residence and occupation, are all to be regarded in settling the question. *Hall v. Pike*, 100 Mass. 497.

The test questions are, was he a traveler and a wayfarer, and was he received and entertained as such by the keeper of the inn. *Norcross v. Norcross*, 53 Me. 169.

The prominent idea in the definitions of the term "guest" is that a guest must be a traveler, wayfarer or transient comer to an inn for lodging and entertainment. *Am. & Eng. Enc. of Law*, 13.

A lodger when he sojourns at an inn and takes his room for a specified time, and pays for his lodging on a special agreement, as by the month or week, is a boarder. *Neal v. Wilcox*, 4 Jones' Law (N. C.) 148.

A guest, as distinguished from a boarder, is bound for no stipulated time. He stops at the inn for as short or as long a time as he pleases, paying, while he remains, the customary charge. But if he and the innkeeper enter into a special agreement for any fixed period at a stipulated price, he ceases to be a guest and becomes a boarder. In modern times, and especially in cities, the practice has become very general of furnishing accommodation by the week or by the month, at a fixed rate, or as the parties may agree, and the persons who furnish accommodation in this way are distinguished as keepers of boarding houses. *Stewart v. McCready*, 24 Howe Pr. Rep. 62.

WILLIAM E. DEVER, attorney for appellee, contended that where a person, by the means usually employed in that business, holds himself out to the world as an innkeeper, he can not, in a suit to enforce his liability as such innkeeper, be heard to say that his professions are false, and that he is not, in fact, an innkeeper. *Schouler on Bailments* (2d Ed.), Sec. 276, Par. 2; *Krohn v. Sweeney*, 2 Daly (N. Y.) 271; *Pinkerton v. Woodward*, 33 Cal. 257; 91 Am. Dec. 657.

The innkeeper is *prima facie* liable for the loss of goods in his charge, but may discharge himself by showing that the goods were lost without any fault whatever on his part. *Metcalf v. Hess*, 14 Ill. 129; *Johnson v. Richardson*, 17 Ill. 304.

The distinction between a guest and boarder (or lodger) is based mainly upon the fact that boarders (or lodgers) contract for a definite stay at specified prices. *Amer. and Eng. Ency. of Law*, Vol. 11, 18; *Shoecroft v. Bailey*, 25 Iowa 553, 555; 1 *Parsons on Contracts*, 628; *Story on Bailments*, 477.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee is by occupation a concert singer.

The appellant is the proprietor of Hotel Carlyle, 228 to 230 North Clark street, Chicago. From August 28 to September 6, 1894, she taught piano lessons to the wife of the manager—not the proprietor—of the hotel, and during that period lodged and ate in the hotel, then went south for five weeks. She returned and lodged, not ate, in the hotel, from October 10th to October 30th, and then went again. December 24th returned again, and lodged only in the house until April 1, 1895.

On the night of March 6, 1895, her cloak was stolen. She sued the appellant and recovered \$60. The only question in the case is, was she a guest at an inn?

She rented a room for her own occupation at \$1.50 per week, and kept it more than three months. But she was by occupation transient, not permanent. In all respects affecting the question of guest or lodger, her case is more satisfactory that she retained the former character than was that of Mrs. Gen. Hancock, in *Hancock v. Rand*, 94 N. Y. 1. Gen. Hancock had engaged the lodgings in the Hotel St. Cloud for a fixed term, subject to contingencies.

The appellee did not engage for any term.

Cards of the Hotel Carlyle in the record, not abstracted, and therefore not to be looked at if they favored the appel-

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lant, show that it was a European hotel of one hundred rooms, with first-class Vienna cafe attached, and by "rules and regulations" claiming the benefit of "an act for the protection of innkeepers," approved February 21, 1861. A European hotel may be an inn.

As a hotel it might at the same time have guests of an inn, and inmates who were not guests, within its walls. A great mass of authority is collected under the title "inns and inn keepers," Am. & Eng. Ency. of Law, Vol. 11, to which we refer without collating.

The judgment is affirmed.

MR. JUSTICE SHEPARD.

I do not think the relationship of inn keeper and guest existed between the parties, under the proved facts and circumstances. P. P. Car Co. v. Smith, 73 Ill. 360.

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Carl Dernburg et al. v. William E. Tefft et al.

1. ATTACHMENT—*Personal Judgment on Service of the Writ.*—Personal service upon the defendants of a writ of attachment issued in aid of a pending suit, gives the court jurisdiction to render a personal judgment against them.

*Assumpsit.*—Attachment in aid. Appeal from the Superior Court of Cook County; the Hon. JAMES GOGGIN, Judge, presiding. Heard in this court at the October term, 1895. Affirmed. Opinion filed March 3, 1896.

## STATEMENT OF THE CASE.

This appeal presents for review a personal judgment rendered by the Superior Court against appellants for the sum of \$281.52 and costs of suit, based upon the service upon all the defendants of an attachment writ in aid, issued on July 9, 1895, the original suit having been commenced July 8, 1895.

The original summons, issued July 8, 1895, was returna-

ble to the August term, 1895, but was not served on the defendants; this writ was returned into court August 9, 1895.

On August 7, 1895, which was the third day of the August term, the appellants, Dernburg, Glick & Horner, filed a plea in abatement of the attachment writ.

The court, on August 9, 1895, proceeded to judgment. The record reads, "and it appearing to the court that due personal service of process of summons issued in said cause has been had on the defendants for at least ten days before the first day of this term, and they being now here three times solemnly called in open court, come not," etc.

MOSES, PAM & KENNEDY, attorneys for appellants.

NEWMAN, NORTHRUP & LEVINSON, attorneys for appellees.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

It appears that the writ issued upon the attachment in aid was served upon each of the appellants July 11, 1895, twenty-five days before the August term, to which said writ was returnable.

The personal service upon appellants of the writ issued upon the attachment in aid, gave the court jurisdiction to render against them a personal judgment.

The statute, Sec. 34 of Chap. 11, R. S., after providing for attachments in aid and the issue of writs thereon, declares that, "when the defendant has been served with the writ, or appears to the action, the judgment shall have the same force and effect as in suits commenced by summons, and execution may issue thereon, not only against the property attached, but the other property of the defendant."

"The writ" mentioned is any writ issued in the attachment proceeding; manifestly, it can not mean the writ issued in a suit begun by summons, because the language is that the writ "shall have the same force and effect as in suits commenced by summons."

The court was authorized by the service had July 11th,



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to render judgment August 9th. As to the appearance of the defendants August 7th, counsel say such appearance did not authorize, at the August term, a judgment against the parties appearing. As to which, see *Crandall v. Birge*, 61 Ill. App. 237.

In *Baldwin v. McClelland*, 152 Ill. 42, in an attachment proceeding, no personal service having been had, on an appearance at the September term, a personal judgment rendered at such term was sustained.

The judgment of the Superior Court is affirmed.

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Henry Nussbaum v. United States Brewing Co.

1. NOTICE—*To Produce Books, etc.*—A notice served upon the opposite party in a suit to produce all the books, of whatever kind or character, and all documents and memoranda of every kind and character showing any dealings between the parties at any time, etc., is insufficient, as being too general.

2. SAME—*Requisites of, etc.*—A notice to produce books and papers must describe the books or papers intended, with at least sufficient particularity to enable the party notified to determine what is wanted.

Assumpsit, for goods sold and delivered. Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the October term, 1895. Affirmed. Opinion filed March 3, 1896.

MOSES, PAM & KENNEDY, attorneys for appellant.

WINSTON & MEAGHER, attorneys for appellee, (FREDERICK R. BABCOCK, of counsel,) contended that the notice should clearly specify what books and papers are wanted, and that they are pertinent to the issue. It would then appear from the record whether appellant had suffered by reason of the failure of the appellee to produce these books in court. *First Nat. Bk. v. Mansfield*, 48 Ill. 494.

A party has no right to have a general inquisitorial examination of all the books, papers and documents of his adversary, with a view to ascertain if, perchance, something can not be found which will possibly aid him. *Hoyt v. The American Exchange Bank*, 1 Duer (N. Y.) 652; *Davis v. Dunham*, 13 How. Pr. (N. Y.) 428; *Walker v. The Granite Bank*, 44 Barb. (N. Y.) 39.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was a suit to recover the price of a set of saloon fixtures claimed to have been sold by the appellee to the appellant.

It was not denied that the fixtures were delivered by appellee to appellant, but it was contended that they were so delivered in exchange for a set owned by appellant, but which were not adapted to his uses.

Appellant's version, being corroborated by the circumstances that appellee was and for a long time had been a customer of appellee; that the fixtures in question were a second-hand set kept in store by appellee; that when they were delivered, the old set, owned by appellant, were taken away by appellee's agent, who brought the ones in question, and that appellee never made any claim or demand for compensation for them until after appellant ceased to buy his beer from the appellee corporation, strongly inclines us to view the judgment with much suspicion.

There was, however, so much positive evidence that the transaction was an express sale of the fixtures to appellant, we do not feel justified in disturbing the judgment based upon the verdict of a jury, unless for some error of law.

The first assigned error is that the court refused to admit in evidence the so-called "beer book," showing the account between the parties, and which, if admitted, it is claimed, would have shown a receipt in full by appellee on July 8, 1892, which was a date subsequent to the transaction in question.

The offer of the "beer book" was, as shown by the abstract, as follows:

"Defendant then offered in evidence book issued by the plaintiff company, showing entries made by it for beer purchased by the defendant from the plaintiff; also entries made by plaintiff showing the money paid out by the plaintiff for city licenses for defendant's saloon; and on the last page of the book the following: 'Paid in full, July 8, 1892, to the U. S. Brewing Co., Otto Spankuch, agent.'"

If admitted, we do not think the contents of the book would have been material to the issue that was involved. The fact that appellant had paid the appellee for everything stated therein, would not have tended to show that appellee had no claim on any other account against appellant.

It was not proved, and there was no offer to prove, that the book was the only one kept that showed transactions between the parties, if they had any other than such as were thereon shown.

The next assigned error calls in question the action of the court in holding that a notice to produce appellee's books and other memoranda was insufficient as a basis for the introduction of secondary evidence.

The material part of the notice was as follows:

"We shall also ask you to produce, to be used as evidence, all the books of whatever kind or character and any and all documents or memoranda of every kind and character of the United States Brewing Company, or of the Michael Brand Brewing Company, showing any dealings between the United States Brewing Co. and Henry Nussbaum, or between the Michael Brand Brewing Co. and Henry Nussbaum, at any time; and on your failure so to do, we shall introduce secondary evidence thereof."

Concerning such notice we need only to say that it is too general. It would be manifestly improper to permit counsel to call upon his adversary in such general terms, and then because some particular book or document were not produced, to be allowed to make secondary proof of its contents.

The notice should have described the book or paper intended with at least sufficient particularity to enable the other party to know what it was that was wanted. 1 Greenleaf on Evid., Sec. 562.

Under the notice, we think, the court did not err in refusing to admit secondary evidence.

We have examined the instructions with care, and find no sufficient justification in them for a reversal of the judgment, and therefore, with considerable reluctance as to the real merits, are obliged to affirm it.

63	38
80	576
80	578

### Martin Emrich Outfitting Company v. W. E. Brown.

1. **WAIVER—Of Motion to Find for the Defendant.**—A motion to instruct the jury to find the issues for the defendant is in the nature of a demurrer to the evidence and to be availing on appeal must be abided by. The defendant, by proceeding to introduce evidence by way of defense, and submitting the case to the jury without renewing the motion, waives the error if any has been committed.

2. **EXCEPTIONS—How Preserved in the Record.**—The only way exceptions to an order overruling a motion for a new trial can be preserved, is by a bill of exceptions. A recital by the clerk in the record of the judgment is not sufficient.

**Transcript from a justice of the peace.** Appeal from the County Court of Cook County; the Hon. ORRIN N. CARTER, Judge, presiding. Heard in this court at the October term, 1895. Affirmed. Opinion filed February 10, 1896.

MYER S. EMRICH, attorney for appellant.

BROWN & NORTON, attorneys for appellee.

The appealing orders in a case must be preserved by a bill of exceptions in order to become a part of the record. Fireman's Ins. Co. v. Peck, 126 Ill. 493.

A general exception can not be taken to several rulings as an exception in gross, but each exception must be taken to each ruling as it arises in the trial. Flaningham v. Hogue,

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Martin Emrich Outfitting Co. v. Brown.

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59 Ill. App. 315; E. St. L. Elec. Ry. Co. v. Cauley, 148 Ill. 490; Walter v. Same, 117 Ind. 247; Johnson v. McCulloch, 39 Ind. 270; E. St. L. Elec. Ry. Co. v. Stout, 150 Ill. 9.

An exception must be taken to an order overruling a motion for a new trial before a reviewing court will consider trial rulings. E. St. L. Elec. Ry. Co. v. Cauley, 148 Ill. 490.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in appellee's favor for \$65, recovered upon an appeal to the County Court, in an action begun before a justice of the peace, for money paid on account of the purchase of certain personal property, under a contract claimed to have been rescinded.

A great variety of errors have been assigned, among which are, first, that the court erred in refusing to instruct the jury to find the issues for the defendant.

The motion to that end was made at the conclusion of the evidence for the appellee, and being denied, and exception preserved, the appellant proceeded with evidence in defense, and did not, at the close of all the evidence, renew the motion, by instruction, or otherwise.

It is held that such a motion is in the nature of a demurrer to the evidence, and to be availing upon appeal must be abided by, and that the defendant, by proceeding to introduce evidence by way of defense, and submitting the case to the jury without renewing the motion, waives the error, if any. L. S. & M. S. Ry. Co. v. Richards, 152 Ill. 59.

The next assignment of error to be considered is the overruling of appellant's motion for a new trial. The only attempt at preserving an exception to the denying of the motion for a new trial, is found in the clerk's entry of judgment against the appellant, which is also copied by the appellant into its supplemental bill of exceptions, wherein, after reciting the overruling of the motion and the order of judgment, it is recited: "Whereupon, the defendant having entered his exceptions, herein prays an appeal," etc.

The only way exceptions to an order overruling a motion

for a new trial can be preserved, is by bill of exceptions; the recital by the clerk in the record of the judgment will not suffice, and it aids nothing by copying the judgment record into the supplemental bill of exceptions, as was done here in the hope of obviating the objection.

It is the judge and not the clerk who certifies to facts occurring during the trial.

The judgment is a part of the record proper that is certified by the clerk, but not so with the motion for new trial and exceptions to action taken thereon.

A bill of exceptions must show the entering of a motion for a new trial, the overruling thereof, and exception thereto, before an Appellate Court can consider any question of the admission or rejection of evidence, or error in giving or refusing instructions, and such omission can not be obviated by the recitals of the judgment. *E. St. L. Electric R. R. Co. v. Conley*, 148 Ill. 490; *Flaningham v. Hogue*, 59 Ill. 315.

Moreover, if what is here shown as a recital in the judgment were embodied in a bill of exceptions, it would lack the essential element of certainty as to what was excepted to.

These two assignments of error being so disposed of, there is nothing left for a court of review to pass upon, and the judgment will be affirmed.

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**Star Brewery of Chicago v. F. E. Otto, for the use of  
Wilhelm Griesser.**

1. *JURISDICTION—Of Non-residents—Findings of the Court.*—The finding of the court that the defendant has been duly notified of the pendency of the suit by publication, and the mailing of a notice to him, pursuant to the statute, is not sufficient to give the court jurisdiction.

2. *SAME—Finding of the Court.*—In a case of service by publication under the statute, etc., the finding of a court of superior and general jurisdiction, that the facts exist which gives it, or that it has jurisdiction, is not sufficient. The facts showing jurisdiction must appear upon the face of the proceedings.

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Star Brewery of Chicago v. Otto.

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3. **AMENDMENT—Of Certificate of Mailing Notices.**—In this case the certificate of mailing the notice to the non-resident defendant was not signed by the clerk. A motion to amend it in the court below was denied and such denial sustained on appeal.

**Garnishee Proceedings.**—Appeal from the Superior Court of Cook County; the Hon. JAMES GOGGIN, Judge, presiding. Heard in this court at the October term, 1895. Reversed and remanded. Opinion filed March 3, 1896.

## STATEMENT OF THE CASE.

This is an appeal taken by the Star Brewery of Chicago, from a judgment rendered against it as garnishee in the attachment suit of William Griesser against F. E. Otto.

The record shows that the affidavit and bond were filed and the attachment writ issued May 15, 1895; that the writ was served on appellant as garnishee, May 16, 1895; that on June 20, 1895, the court found that "the defendant had been duly notified of the pendency of the suit by publication of notice and by mailing the same to him pursuant to the statute in such case made and provided," and accordingly entered judgment against the defendant for \$1,019.07; that on the same day the default of appellant was taken and conditional judgment entered against it for the above amount; that a writ of *scire facias* was issued and served on appellant June 25, 1895; that on August 8, 1895, the default of appellant on the *scire facias* was entered and the conditional judgment of June 20, 1895, was made absolute and final; that at the same term at which this judgment was entered appellant moved to set aside the judgment, and also appealed to this court from the entry of the judgment; that also at the same term appellee presented to the court evidence of the mailing of the attachment notice, pursuant to the statute, and moved the court for leave to amend the certificate of mailing notice by allowing the clerk to sign the same, the omission of the signature having been shown to be a mistake of the clerk; that on the hearing of this motion appellant offered an affidavit of the agent of the defendant, which affidavit stated that no indebtedness existed from the defendant to the

plaintiff. The record further shows that the motion was denied.

MOSES, PAM & KENNEDY, attorneys for appellant, contended that the strictest requirement and compliance with the statute is necessary in this proceeding to give the court jurisdiction over the defendant for the purpose of entering the judgment *in rem* and against the garnishee, and that the absence of the proper certificate of mailing notice is fatal to the judgment entered, and that the court acted without jurisdiction in the premises. Haywood v. Collins, 60 Ill. 328; Dennison v. Taylor, 142 Ill. 45.

LACKNER & BUTZ, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The statute requires that a notice of the attachment, etc., be mailed to the defendant at his residence, if the same is stated in the affidavit; and that the certificate of the clerk of such mailing shall be *prima facie* evidence of the fact. In this case it appears from the affidavit for attachment that the defendant's residence is Dortmund, Germany. The paper which purports to be such a certificate, and purports to certify that on June 1st a notice was mailed to the defendant F. E. Otto, Dortmund, Germany, is unsigned by the clerk or anybody else, and simply has the file mark on the back thereof.

In attachment proceedings, where the residence of the defendant is given, one of the requisites of jurisdiction is the mailing of notice to the defendant; and proof of such mailing must be made. Neither the *prima facie* evidence of mailing designated by the statute, or other evidence of mailing was produced in this case before judgment was entered.

The finding by the court that the defendant had been duly notified of the pendency of the suit by publication and by mailing the same to him, pursuant to the statute, is not sufficient to give to or establish jurisdiction in the court.



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Hyde v. Love Brothers.

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The proceeding was not one known to the common law, but statutory and extraordinary.

In such case the finding of a court of superior and general jurisdiction that the facts exist which give it, or that it has jurisdiction, is not sufficient. The facts showing jurisdiction must appear on the face of the proceedings. *Haywood v. Collins et al.*, 60 Ill. 328; *St. Louis Coal Mining Co. v. Sandoval Coal Mining Co.*, 111 Ill. 32.

This court, in *Law v. Grommes*, 55 Ill. App. 312, held that in a common law proceeding, the record of a court of superior and general jurisdiction reciting that due service of process was had upon a party was sufficient to give jurisdiction, the record containing nothing to impeach or contradict such recital, and that with such recital the judgment as to jurisdiction over the party so found to have been served, was secure from direct attack; following in so holding, *Timmerman v. Phelps*, 27 Ill. 496; *Coursen v. Hixon*, 78 Ill. 339; *Turner v. Jenkins*, 79 Ill. 228; *Haworth v. Huling*, 87 Ill. 23.

The Supreme Court, in *Law v. Grommes*, 158 Ill. 492, hold that in a direct proceeding to reverse a common law judgment, the finding by a court of superior and general jurisdiction that a party was only duly served with process, is not sufficient to establish its jurisdiction over the person of such party; and such is now the law of this State.

We are not inclined to interfere with the action of the court below in refusing to permit the amendment asked by appellee.

The judgment of the Superior Court is reversed and the cause remanded.

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**Benjamin Hyde v. Love Brothers.**

1. **WARRANTY**—*When the Vendee is Not Concluded from Asserting.*  
—The buyer, under an executory contract, is not, by the passing of the time for an examination, concluded as to the character of the goods and their conformity to the agreement. If they are not such as he bargained

for, he may still refuse to accept and may return them; or he may receive them and sue for a breach of the warranty; or recoup his damages in an action brought for the contract price.

2. **RESCISSION OF CONTRACTS—*Claims for Damages—Distinction.***—A distinction exists between the acts which will constitute a waiver of a right to rescind a contract for materials and a right to insist upon damages for a failure to supply the materials contracted for.

3. **VENDOR AND VENDEE—*Using Materials, Not an Acceptance as a Compliance with the Contract.***—It does not follow that a vendee, by making use of materials, accepts them as a compliance by the vendor with the terms of contract under which they are furnished.

4. **CONTRACTS—*Construction of—Damages.***—Under the terms of a contract of sale providing that all iron furnished was to be inspected on the cars before being unloaded, and no allowance should be made for any broken or damaged castings, unless the same were found to be broken or damaged on the cars, all claims for breakage or damage are cut off after the castings left the cars, but not as to claims that the castings were not according to the contract.

**Assumpsit.**—Goods sold and delivered. Appeal from the Superior Court of Cook County; the Hon. WILLIAM G. EWING, Judge, presiding. Heard in this court at the October term, 1895. Reversed and remanded. Opinion filed March 3, 1896.

#### STATEMENT OF THE CASE.

This is an action brought upon a contract for the recovery of money said to be due appellees under and by virtue of the terms of a contract. The action was for goods sold and delivered to the appellant. The declaration consisted of the common counts, with one special count on the contract offered in evidence, to which declaration a plea of the general issue was filed. Subsequently, by leave of court, a special plea claiming damages by way of set-off was filed, to which plea a replication was filed by the plaintiffs and the case submitted to the court and jury on the pleadings above mentioned, and the evidence thereunder given.

The contract sued upon was to manufacture and furnish certain architectural iron for appellants.

E. P. LANGWORTHY, attorney for appellant.

M. L. THACKABERRY, attorney for appellees.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The case seems to have been tried upon the theory that as all iron was to be inspected on the cars before being unloaded, after the iron was so unloaded no objection thereto could be made. We do not think that appellant was concluded by a failure to inspect the iron before it was unloaded.

The contract does not provide that objections to the iron could not be made after it had been unloaded. The contract was to furnish cast iron columns, etc., for buildings to be erected in Chicago; it was to be paid for by weight. Under such an arrangement, appellees' interest was to make the columns, etc., heavy; and appellees had an interest in whatever sand clung to the material and was weighed along with it.

Upon the trial a good deal of evidence was offered, some of which was admitted and some rejected, tending to show that the columns, etc., were made unnecessarily thick, honey-combed, lumpy, and had sand pockets, and that in consequence of this, a great deal of work had to be and was done to make the material conform to the plans and specifications.

The court held that if this work was done and these things appeared after the time provided for inspection, it was immaterial.

This was error.

The buyer under an executory contract is not, by the passing of the time for an examination, concluded as to the character of the goods and their conformity to the agreement. If they are not such as he bargained for, he may still refuse to accept, and may return them; or he may receive them and sue for breach of warranty, or recoup his damages in an action brought for the contract price. *Underwood et al. v. Wolf*, 131 Ill. 425; reviewing *same v. same*, 31 Ill. App. 637; *Mears v. Nichols*, 41 Ill. 207; *Peck v. Brewer*, 48 Ill. 50; *Doane v. Dunham*, 65 Ill. 512; *same*, 79 Ill. 131; *Benjamin on Sales*, 6th Am. Ed., Secs. 894, 898, 899.

A distinction exists between the acts which will constitute a waiver of a right to rescind such a contract and a right to insist upon damages for a failure to supply the goods contracted for. Benjamin on Sales, Secs. 895-901:

It does not follow that appellant, by making use of the columns, accepted them as a compliance by appellees with their contract. Appellant immediately and persistently complained of the character of the material supplied; and appears to have, after much work in making good defects therein, used the same because such course was, under his engagements, less damaging to him and appellees than would have been a return of the imperfect work.

The rulings of the trial court upon the admission of evidence and upon instructions asked, not being in accordance with the views here expressed, the judgment of the Superior Court is reversed and the cause remanded.

MR. PRESIDING JUSTICE GARY.

I concur in Judge Waterman's opinion, but wish to add that perhaps undue weight was given on the trial to provisions of the contract under which the iron was furnished, as follows:

"All iron to be inspected on cars before being unloaded.  
\* \* \* No allowance shall be made \* \* \* for any broken or damaged castings, unless the same have been found broken or damaged on the cars."

It is quite clear that the inspection was intended only for the purpose of ascertaining whether castings were broken or damaged; and to cut off any claim for breakage or damage, after the castings left the car. In handling, either in unloading or thereafter, breakage would be always possible, and the appellees wanted no opening left for claims that might be false.

Whether the castings were according to specifications, or too heavy, or had sand in the cores, could not be ascertained by looking at them on the cars.

**Berthold Reis and Mayer Guettel v. Manascha Pitzele  
et al.**63 47  
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1. **RECORDS**—*Insufficiently Certified*.—A certificate of the clerk of the trial court, stating that “the above and foregoing is a true, perfect and complete transcript of the record so far as pertains to the cross-bill, in a certain cause lately pending in said court, on the chancery side thereof, between,” etc., is not sufficient.

**Bill in Chancery**.—Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the October term, 1895. Affirmed. Opinion filed March 8, 1896.

CRATTY BROS., MACLAREN, JARVIS & CLEVELAND, attorneys for appellants.

MOSES, PAM & KENNEDY, attorneys for appellees.

DEFREES, BRACE & RITTER, attorneys for William Kratzenburg.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

To the original record, filed here October 2, 1895, the clerk of the Circuit Court certified that it was a complete transcript “so far as pertains to the cross-bill” in a certain chancery cause—of which he gave the title—lately pending in that court.

We can not reverse a decree upon such certificate. *Village of Melrose v. Bernard*, 126 Ill. 496.

November 29, 1895, more record was here filed, which the clerk of the Circuit Court certified, is a “complete copy of a certain bill of complaint filed” in the same cause.

That does not help. *Atkinson v. Linden Steel Co.*, 35 Ill. App. 448.

Those cases, or this opinion, would have no greater weight by copying from them.

The decree is affirmed.

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**Shober & Carqueville Lithographing Co. v. Herman Schedler.**

1. TORTS—*Waiver of, Suit in Assumpsit.*—Although the act of a party in obtaining the goods of another and converting them into money, or in applying them to his own use, may be tortious, the owner may waive the tort and charge the wrongdoer on the common counts as for money had and received, or for goods sold and delivered.

**Assumpsit.**—Goods sold and delivered. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the October term, 1895. Affirmed. Opinion filed March 8, 1896.

ISRAEL COWEN, attorney for appellant.

EDWARD MAHER and CHARLES C. GILBERT, attorneys for appellee.

When one wrongfully takes the goods of another and applies them to his own use, the owner may waive the tort, and charge the wrongdoer in assumpsit on the common counts, as for goods sold, or money received. *City of Elgin v. Joslyn*, 136 Ill. 532; *T. W. & W. R. W. Co. v. Chew*, 67 Ill. 378.

If one commits a tort on the goods of another, by which he gains a pecuniary benefit, as, if he wrongfully takes the goods and sells them, or otherwise applies them to his own use, the owner may waive the tort and charge him in assumpsit on the common counts, as for goods sold, or money received. 1 *Greenleaf Ev.*, Sec. 108, and note 3; *Putnam v. Wise*, 1 Hill. 234, and note A; *Lightly v. Conston*, 1 Tarnston, 112.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellee was a lithographer, doing business in the city of New York. At the request and direction of one Chouquet, he engraved certain stones and sent them by an express company C. O. D. to the appellant at Chicago. And the stones so sent were billed by the appellee to the appellant as goods sold by him to it.

Clark v. Murton.

Appellant refused to pay the bill, and the express company refused to deliver the stones without such payment. Thereupon the appellant brought suit in replevin against the express company for the stones, obtained them and appropriated them to its own use.

Failing, after negotiations with appellant, to obtain his pay, the appellee brought his suit in assumpsit, filing the usual common counts.

Before a jury he recovered a verdict upon which judgment was entered.

The point is made that assumpsit does not lie under such facts.

It seems to be settled law in this State that, although the act of a party in obtaining the goods of another and converting them into money, or in applying them to his own use, may be tortious, the owner may waive the tort and charge the wrongdoer in assumpsit on the common counts as for money had and received, or for goods sold and delivered. *City of Elgin v. Joslyn*, 136 Ill. 525; *T. W. & W. Ry. Co. v. Chew*, 67 Ill. 378; *Farson v. Hutchins*, 62 Ill. App. 439.

To the replevin suit brought by appellant, appellee was not made a party defendant, and he was not bound to await the determination of that suit, and, if appellant were unsuccessful, bring suit on the replevin bond.

There was no error in the admission of evidence, and none is pointed out as to the instructions.

The judgment should be affirmed, and it is so ordered.

Thomas Clark et al. v. Peter Murton.

1. **PERSONAL INJURIES—Want of Ordinary Care.**—Where a party by the exercise of ordinary care can ascertain and avoid a pending danger, or where he knows of the existence of danger, it is not only his duty to avoid such danger, but he is not in the exercise of ordinary care when he fails to do so.

**Trespass on the Case, for personal injuries.** Appeal from the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Heard in this court at the October term, 1895. Reversed and remanded. Opinion filed March 3, 1896.

SCHUYLER & KREMER, attorneys for appellants.

REMY & MANN, attorneys for appellee.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee's own version of this case defeats him. He was a carpenter working for the appellants most of the time, in a second story in their shop, for twenty months.

Near his bench, during all the time, was an opening in the floor about two and a half by three feet, with a loose cover. Through that opening lumber was taken up several times each day, the appellee sometimes assisting, and sometimes himself removing the cover.

Anybody who wanted lumber up, removed the cover.

It had become customary to him to pay little attention to the opening.

The only account he could give of how he received the injury for which he sues, is that he did not know that the hole was open and he fell through.

No witness adds to that account anything more favorable to his case.

The shop was well lighted. It is clear that his injury is the result of his own inattention, thoughtlessness, heedlessness—whatever name may be given to that state of mind which doubtless comes to most people at times of temporary obliviousness to surroundings. Whether a boy in the shop who worked part of the time as a carpenter and part of the time as a laborer, was the one who removed the cover, and whether he called to the appellee to look out, are not matters material to the case. It is not what others did, but what the appellee did not do—that is, attend to his own safety—that prevents any recovery of damages. C. & N. W. Ry. v. Kane, 50 Ill. App. 100.

The judgment is reversed and the cause remanded.



**Midland Company and William R. Trasher v. Carl  
Anderson.**

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1. **RECEIVERS—When Proper to Appoint.**—Where a corporation has been ousted of its franchises in a quo warranto proceeding and its directors have abandoned it, its assets and stockholders, to whatever fate awaits them, a receiver is properly appointed upon the application of a single stockholder to preserve and distribute its assets among the creditors and stockholders of the company.

**Bill for the Appointment of a Receiver.**—Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the October term, 1895. Affirmed. Opinion filed March 3, 1896.

**STATEMENT OF THE CASE.**

This is a bill filed by a single stockholder of a corporation after ouster of its franchises in a quo warranto proceeding, and within the two years allowed by statute for the winding up of its business, filed in behalf of himself and all other shareholders, who chose to come in as complainants; making the corporation, its directors, its secretary and general manager, and all the other shareholders, who do not wish to join as complainants, parties defendant, praying for the appointment of a receiver, an injunction against its corporate officers to restrain them from collecting its assets and asking for an accounting. The original bill was filed only against the Midland Company. Upon demurrer being sustained to it, complainant, by leave of court, amended, making Wm. R. Trasher, party defendant also. Demurrer being again sustained to the bill as amended, complainant filed, by leave of court, a "supplemental amended bill," making all the directors of the company also parties defendant.

Under this supplemental amended bill service was had only on the Midland Company and on Wm. R. Trasher, appellants, who each filed a general and special demurrer to the amended supplemental bill, which demurrer was overruled, and upon the supplemental amended bill and the affi-

davit of Wm. R. Trasher, the court appointed a receiver, from which order appointing such receiver, the said Midland Company and Wm. R. Trasher prayed a joint and several appeal to this court.

The bill sets forth "that on or about the 10th day of November, 1894, an order of ouster was entered in said cause against said company, perpetually enjoining it, and that by said order it was perpetually enjoined from ever doing any of the business or functions of said corporation.

"That at the time of the entry of said judgment there was in possession of said corporation quite a large amount of notes which it had guaranteed, and which it had been compelled to take up by reason of such guaranty, judgments and claims against divers and sundry persons, the amount of which complainant is unable to state, and "a large claim against Daniel H. Tolman for misappropriation of the funds of said company.

"The bill charges that the books and accounts and assets of the corporation, as complainant is informed and believes, are now in the possession and under the control of one William R. Trasher, who has for a long time been acting secretary.

"That there has been no distribution of the assets of said company among the stockholders, and your orator is informed and believes, and so states the fact to be, that there has been no meeting of the board of directors of such company for the last two years; that there are no directors now acting for said company; that the last president of the company has removed from the State of Illinois, and that there are no officers now acting except William R. Trasher, the last secretary of said company; that the books of accounts, notes, property and effects of said company have for the last two years, and ever since the ouster of said company from its franchises, been in the possession of said William R. Trasher, as secretary of the said company; that said Trasher has been collecting outstanding assets and demands due to said company, and has been converting and appropriating said assets to his own use, and to the use of others not stock-

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Midland Co. v. Anderson.

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holders nor creditors, or entitled to any part of said assets; that one claim for about the sum of \$700, he has assigned to Daniel H. Tolman, without any consideration therefor; that the said company has large demands against the said Daniel H. Tolman for moneys misappropriated and misapplied by him while treasurer of the said Midland Company, and no effort has been made to collect the same or any suit started therefor; that the stockholders of said company will lose their entire interest in the said assets, unless action is taken to preserve the same."

MOSES, PAM & KENNEDY, attorneys for appellant William R. Trasher.

JOHN G. HENDERSON, attorney for appellant the Midland Company.

BULKLEY, GRAY & MORE, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The bill in this case, among other things, charges that Wm. R. Trasher, in whose possession the assets of the Midland Company for two years have been, has been converting and appropriating such assets to his own use and to the use of others not entitled to any part of the same; and that the stockholders of said company will lose their entire interest in said assets unless action is taken to preserve the property.

The said Trasher and the company, instead of answering, demurred to the bill. For the purposes of the bill its allegations, well pleaded, are admitted.

Under the allegations of the bill it would seem that the directors of the company have abandoned it, its assets and stockholders, to whatever fate awaits them under the administration of the secretary, who, it is by demurrer admitted, has been guilty of a gross breach of trust.

The administration of the assets should be by some one

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who will endeavor to preserve and distribute them ratably and justly to the creditors and stockholders of the company.

The order of the Circuit Court appointing a receiver is affirmed.

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**Anthony H. Lanan v. The Hibbard, Spencer, Bartlett & Co.**

1. PRACTICE—*Right to Address the Jury Absolute*.—The right of a party litigant to address the jury by his counsel is absolute.

*Assumpsit*, on a guaranty. Appeal from the County Court of Cook County; the Hon. CHARLES H. DONNELLY, Judge, presiding. Heard in this court at the October term, 1895. Reversed and remanded. Opinion filed March 8, 1896.

HAMPDEN KELSEY, attorney for appellant.

ROSENTHAL, KURZ & HIRSCHL, attorneys for appellee.

MR JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

We regret that we are unable to say that the evidence in this case was so clear that the court might properly have instructed the jury to find for the plaintiff the amount recovered by him, in which case appellant would have had no right to address the jury. As it was, the right of appellant's counsel to, for a reasonable time, argue his cause to the jury, was absolute. *Carpenter v. First Nat'l Bank*, 19 Ill. App. 549; *Zweetush v. Lowry*, 57 Ill. App. 106; *Hettinger v. Beiler*, 54 Ill. App. 320.

Because appellant's counsel was not permitted to make any argument to the jury, the judgment of the County Court is reversed and the cause remanded.

**John Stirlen v. Sherman S. Jewett et al.**

1. **RECEIVER—Appointment of, by Collusion.**—The appointment of a receiver by collusion of a debtor, so that his business may be carried on without interference on the part of his creditors, is a fraud upon their rights.

2. **CREDITOR'S BILL—Insufficient Return of Execution.**—The return of an execution unsatisfied, by order of the plaintiff's attorneys, affords no ground for the maintenance of a creditor's bill.

**Creditor's Bill.**—Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the October term, 1895. Affirmed. Opinion filed March 8, 1896.

**STATEMENT OF THE CASE.**

This appeal is prosecuted to reverse a decree granting the prayer of an intervening petition filed by appellees in a creditor's suit brought by appellant against the Chicago Fuel Gas Appliance Co., a corporation. The decree ordered that the original bill filed by appellant be dismissed; that the receiver be discharged, and pay forthwith into court all property in his hands as such receiver.

The original bill was filed July 5, 1893, upon a judgment for \$300, entered by confession upon that day, upon which an execution had, previously to the filing of the bill, been issued, demand of payment thereof made by the sheriff upon the defendant, and the defendant failing to pay, the execution was, upon the day of its issue, by order of the plaintiff's attorney, returned no property found and no part satisfied. A receiver was appointed the same day the bill was filed. He immediately took possession of the property of the defendant, which consisted of a stock of fuel gas appliances in its place of business, 15 and 17 Madison street, Chicago, and book accounts, and continued the business of the defendant, under the order of court, until the following December.

August 16, 1893, appellant filed his supplemental bill to wind up the defendant corporation.

"August 21, 1893, appellees, Sherman S. Jewett et al., obtained judgment in the Circuit Court of Cook County for the sum of \$860 and costs, and an execution was issued to the sheriff of said county.

"September 19, 1893, appellees filed their intervening petition, to which a demurrer was sustained, and the appellees then filed their amended petition, setting forth their judgment for merchandise sold to the Chicago Fuel Gas Appliance Company in the months of April, May and June, 1893; the issuance of the execution to the sheriff; the entire proceeding leading up to the appointment of the receiver; that the judgment in favor of said Stirlen was confessed for the purpose of hindering, delaying and defrauding the creditors of said Chicago Fuel Gas Appliance Company; that there were ample assets in the possession of said company for the satisfaction of said Stirlen's judgment; that said Stirlen did not pursue his remedy at law to the fullest extent, and never made a *bona fide* attempt to collect said judgment, although he knew of the existence and value of said property; and that said Stirlen filed his said bill for the purpose of hindering and delaying the appellees and the other creditors of said company."

Appellees prayed that the receiver be dismissed in order that they might pursue their remedy at law, or that their execution be satisfied out of property in the hands of the receiver.

To this amended petition, a general and special demurrer was filed and overruled, and upon the filing of the answers and replications, the cause was referred to a master in chancery to take proofs and report his conclusions on the law and the facts. The master found the facts to be substantially as alleged in the amended petition, and recommended that the creditor's bill, filed by said Stirlen, be dismissed and the receiver be discharged. To this report both parties filed objections, and the same were overruled.

The prayer of appellee's petition was amended by leave of court, and the court then approved and confirmed the master's report, dismissed the original bill of complaint for want of equity, discharged the receiver, and ordered him to

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file a report and pay into court all moneys in his hands; authorized appellees to levy their execution on all remaining assets of said company, and that the settlement of the receiver's accounts be reserved for further consideration. From this decree appellant appealed.

STIRLEN & KING, attorneys for appellant.

JOHNSON & MORRILL, attorneys for appellees.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The proceedings had by collusion between appellant and the Chicago Fuel Gas Appliance Company in the way of a confession of judgment by said company, issue and return of execution, filing of a creditor's bill, and the appointment of a receiver for the corporation, defendant, appear to have been a plan by which the Fuel Gas Appliance Company was, under the sheltering wing of a court of chancery and through the administration of a friendly receiver, to continue to carry on its business, while its creditors looked vainly on.

At a time when the corporation had in its hands abundant personal property out of which his judgment might have been satisfied, appellant, by arrangement with his debtor, had his execution returned unsatisfied, that a receiver might be appointed for, and the business of the corporation carried on without the annoyance of a seizure of its assets upon attachments or executions obtained by its creditors.

Into the content of this situation a creditor intruded and obtained a dismissal of the bill upon which the receivership was founded. The return of the execution unsatisfied by order of the plaintiff's attorneys, afforded no ground for the maintenance of a creditor's bill. *Schubert v. Homel*, 50 Ill. App. 597; 152 Ill. 313.

The appointment of the receiver was one which, as against the objections of creditors, could not be justified, and the court properly set the appointment aside and dismissed appellant's bill.

The decree of the Circuit Court is affirmed.

CASES  
IN THE  
APPELLATE COURTS OF ILLINOIS

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FOURTH DISTRICT—AUGUST TERM, 1895.

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**Loan and Protection Association of Patoka v. Nathaniel  
W. Holland.**

1. **BUILDING AND LOAN ASSOCIATION—Power of Directors to fix Compensation of Secretary.**—The interest of members of these associations is carefully conserved by the statute, which should be strictly enforced by the courts to that end. The directors have no power to fix or enlarge the compensation of the secretary, and take from loan or working funds, other than as provided by the charter, money to pay him for extra services.

2. **SAME—Issue of Paid-up Stock.**—Under our statute the issue of paid-up stock by a building and loan association is *ultra vires* and without authority.

3. **SAME—Salaries of Officers.**—The salary of the secretary of a building and loan association is fixed by the charter adopted by the stockholders. The directors can not change it, but must conform to it, and where it fixes the salary of an officer, any allowance in excess of the same can not be made by the association or its directors.

4. **SAME—Contract to Pay in Excess of Salaries Void.**—An undertaking by a building and loan association, to pay an officer an extra fee or sum beyond that fixed by the charter, is not binding upon the corporation, although extra services have been rendered.

5. **SAME—Payments in Excess of Salaries may be Recovered Back.**—Payments made by the directors of a building and loan association to an officer, in excess of his salary as fixed by the charter, may be recovered back by the association.

6. **DURESS—Payments Made by Compulsion.**—A payment is not to be regarded as compulsory, unless made to relieve the person or property of



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the party making it, from an actual and existing duress, imposed upon him by the one to whom the payment is made.

7. *SAME—Threats of Prosecution—When Insufficient.*—Threats of criminal prosecution against a person do not constitute a sufficient duress in law to enable him to recover back money paid, where no warrant has been issued or criminal proceedings commenced.

*Assumpsit*, for money paid under duress. Appeal from the Circuit Court of Marion County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding. Heard in this court at the August term, 1895. Reversed and remanded. Opinion filed March 7, 1896.

FRANK F. NOLEMAN and W. F. BUNDY, attorneys for appellant, contended that building and loan associations are not authorized by law to issue paid-up stock. The statute expressly provides that no periodical payments shall be made on the shares of stock of such associations exceeding the sum of \$2 on each share. Hurd's Rev. Statute, 379, Sec. 6; Attorney General's Report, Illinois, 1895, pages 27 to 32 inclusive, and pages 53, 55 and 64.

No officer of such associations, except the secretary, shall be entitled to compensation, and such compensation must be fixed in the charter. The charter must be adopted by the stockholders and not by the board of directors. Therefore the board of directors has no legal authority to fix the compensation of the secretary. Hurd's Rev. Statute, 378, 379, Secs. 2, 5.

It is self-evident that such associations can not do indirectly what they have no power to do directly. That an officer thereof can not legally be paid a salary or other compensation by such an association through its secretary, and thus avoid the law which prohibits such officer from receiving such salary or compensation directly from such association.

The money received by the appellee by means of these fees was a compensation or salary, and therefore illegally received. The demand of the appellant that it be paid back, is a legal demand, and when so paid can not be recovered back, although paid under protest. The rule is, that to warrant such recovery there must be compulsion—actual, present, potential—and the demand must be illegal. The payment

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must be induced by force of process available for instant seizure of person or property, and the property so paying must give notice of the illegality of the demand and of his involuntary payment. 18 Am. & Eng. Ency. Law, 214; Harvey v. Girard Nat. Bank, 119 Pa. 212; De LaCuesta v. Ins. Co. of North America, 136 Pa. 62.

The element of coercion being essential, mere protest or notice alone, however, can not change the character of the payment nor convert what in law would otherwise be a voluntary payment into an involuntary one. Detroit v. Martin, 34 Mich. 170; Harvey v. Girard Nat. Bank, 119 Pa. 212; De LaCuesta v. Ins. Co. of North America, 136 Pa. 62; 18 Am. & Eng. Ency. Law, 219 (note).

To justify the defense of duress by means of threats, the threats must be such as would naturally produce such fear as would overcome the will of one with ordinary courage. Young v. Simms, 41 Ill. App. 30; Lange v. Soffett, 33 Ill. App. 625; Schwartz v. Schwartz, 29 Ill. App. 526.

Mere threats of imprisonment for which there is no ground do not constitute duress, as the person threatened could not be put in fear thereby. Nor do threats of criminal prosecution constitute duress where neither warrant has been issued nor proceedings commenced. Rendleman v. Rendleman (Ill.), 41 N. E. 224; Higgins v. Brown, 78 Me. 473; Harmon v. Harmon, 61 Me. 227; Compton v. Bunker Hill Bank, 96 Ill. 301.

Money voluntarily paid with a full knowledge of the facts and circumstances under which it was demanded can not be recovered back upon the ground that the payment was made under a misapprehension of the legal rights and obligations of the party paying. A payment is not to be regarded as compulsory unless made to relieve the person or property from an actual and existing duress imposed upon him by the party to whom the money is paid. Elston et al. v. City of Chicago, 40 Ill. 514; Swanston v. Ijams, 63 Ill. 165; 18 Am. & Eng. Ency. Law, 223.

When a contract is illegal, whether it is because of being *malum prohibitum* or *malum in se*, the law will not afford

affirmative relief to either, but will leave the parties as it found them. *Compton v. Bunker Hill Bank*, 96 Ill. 301; *St. L., J. & Chi. R. R. Co. v. Mathers*, 71 Ill. 592; *Jerome v. Bigelow*, 66 Ill. 452; *Liness v. Hesing*, 44 Ill. 113.

The board of directors as a board may bind the corporation by admissions and declarations, but a single director president or secretary can not do so, except when acting within the scope of his authority or as special agent, and the power to act in the particular manner must be shown. *Cook on Stock and Stockholders*, 726; 17 *Am. & Eng. Ency. Law*, 81, 83 and 93.

The directors of a corporation are regarded as trustees for the stockholder. The law has absolutely inhibited a trustee from placing himself in a position where his own private interests would naturally tend to make him neglectful of his obligations to his principal. Appellee being a director and vice president of appellant company could neither make a contract on behalf of such company and at the same time reserve a private interest, nor could he subsequently become interested in its execution with a view to participation in the profits of the contract. And the *cestui que trust* has its election to ratify the act of the trustee and insist upon all the advantage of it, or disaffirm it *in toto*, as shall be most to its interest. *G. C. & S. R. R. Co. v. Kelly et al.*, 77 Ill. 435, and cases cited; *Cook on Stock and Stockholders*, Secs. 649, 650.

Contracts made with a corporation in which the directors are interested either directly or indirectly are voidable at the instance of the company or the stockholders; and this is so whether the directors entered into the contract in its inception or subsequently acquired an interest therein. 17 *Am. & Eng. Ency. Law*, 119, 120, 121; *Root on Corporations*, 245.

VAN HOOREBEKE & FORD, attorneys for appellee.

There is nothing in the statute prohibiting the issuing of paid-up stock. The provision referred to in regard to periodical payments has no application to paid-up stock, there being no periodical payments at all.

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Our courts have been exceedingly liberal in the construction of statutes in favor of these associations. *Freeman v. Ottawa*, etc., 114 Ill. 183; *Winzet v. Q. Build. Ass'n*, 128 Ill. 84; *Payette v. F. H. Ass'n*, 27 Ill. App. 307; *31st St. v. Wetherell*, 43 Ill. App. 509; *Kadish v. G. C. L. & B. Ass'n*, 47 Ill. App. 602.

It is a familiar rule of law that the action of assumpsit for money had and received will lie, wherever a party has obtained money which in equity and in good conscience he ought not to retain and which he should in justice return to the plaintiff.

The main inquiry is whether the defendant holds money which *ex aquo et bono* belongs to the plaintiff. *Allen v. Stinger*, 74 Ill. 119; *Barnes v. Johnson*, 84 Ill. 95; *Watson v. Woolverton*, 41 Ill. 241; *Alderson v. Ennor*, 45 Ill. 128; *Sangamon Co. v. City of Springfield*, 63 Ill. 66; *Laffin v. Howe*, 112 Ill. 253; 2 Chitty on Contracts (11th Am. Ed.), 928 and 936; 2 Wharton on Contracts, Sec. 730.

When the payment of money is compelled by undue advantage taken of the situation of the party paying it and is against equity and good conscience it may be recovered back. *County of La Salle v. Simmons*, 5 Gil. 513.

A payment made under protest to avoid prosecution under a void ordinance, is an involuntary payment, for the recovery of which an action of assumpsit will lie. *Prikett v. Madison Co.*, 14 Ill. App. 463; *Harvey & Boyd v. Town of Olney*, 42 Ill. 336; *Chicago & A. R. R. v. C. V. & W. Coal Co.*, 79 Ill. 121.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The appellee brought this suit to recover certain money alleged to be due him. 1. For services performed for appellant. 2. For money paid by him to appellant under protest, etc.

The main contention is as to the second ground of action, on which he obtained judgment.

The facts in brief are that appellant is a loan and homestead association, and appellee was a director thereof dur-

ing most of the time of its existence. One W. C. Kesner was secretary of the association, whose compensation was fixed as follows: He was to receive the admission fees in membership, the transfer fees of stock, and the quarterly dues on all stock sold. He was to furnish the room for the association free of expense and pay the expense for lights, fuel, stationery, etc.

Thereafter the board of directors, on the motion of appellee, passed a resolution to issue two classes of paid-up stock, one class interest bearing, and the other class non-interest bearing; whereupon, as claimed by appellee, a contract was made by the board with the secretary, to allow him \$10 for each share of paid-up stock that was subscribed, in addition to his other compensation. There is no record of such a contract, however. No resolution was passed to that effect or vote taken. After that time, the secretary made a contract with the appellee, while he was a director, to solicit subscriptions for running and paid-up stock, and was to pay such solicitor one-half that was allowed the secretary, viz., twenty-five cents for the running stock and \$5 for the paid-up stock, per share. The appellee obtained subscriptions for about five hundred shares of paid stock, for which he received about \$2,500, and the secretary the same amount. This \$10 fee was taken out of the money paid by the subscriber and only the balance paid into what was called the working fund.

In August, 1894, an inspector from the auditor's office inspected the affairs of the association and found there was a deficit of \$4,058.20; that is, the association could not pay back to the members the amount they had paid in, outside of profits, by that sum. He discovered the fact that \$10 was taken from each share of paid-up stock, as before stated, and attributed the deficit principally to that cause, and claimed that such an arrangement was illegal. The fact of the shortage and its cause he laid before the board of directors and stated that if the amount was not made good the office would report the matter to the attorney-general for action. The secretary at once agreed to return the

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amount received by him and appellee was urged to do the same, but he declined at the time to do so, offering, however, to pay one-ninth of the whole sum, as his share as a member of the board of directors. The other directors declined to do this, and the matter ran along for several days. In the meantime appellee was earnestly urged to pay up what was alleged to be the amount received by him as fees on such paid-up stock. He claims the directors, not as a board, but as individuals, threatened him with prosecution criminally if he did not do so, and thereafter, because of such threats, he proposed if they would allow him the book value of the stock he held and accept his resignation as a director that he would, in that way, return such fees. This proposition was accepted, his stock was canceled and his resignation accepted, which was in full settlement of the liability claimed against him, which amounted to \$1,856.20. The actual money he paid for the stock so canceled was \$1,011 and some cents. The book value of his stock was \$188 and some cents in excess of said claim, which amount was at the time paid to and received by appellee. At the time of the settlement, the book value was not computed further than July, 1894. Thereafter, in November, the book value, with dividends to which this canceled stock was entitled to be credited for August, was computed, which dividend amounted to \$21.44. This sum was claimed by appellee and paid to him November, 1894.

The declaration avers that the defendant "then and there threatened the plaintiff with prosecution and imprisonment if he failed to refund or pay the same to the defendant as demanded, and the plaintiff avers that by reason of the demand and threats aforesaid, and all the while protesting against the right of said defendant to said money, \* \* \* under protest paid to said defendant the sum of twenty-five hundred dollars, to which the defendant had no right or claim against the plaintiff, and which money so paid the defendant was and is the money of the plaintiff."

The evidence shows that no suit was instituted against appellee, either civilly or criminally, and that the associa-

tion, by its board of directors, took no action of any kind in regard to the claim against appellee before the settlement. Appellant therefore claims there was no duress or coercion.

This position is considered well taken for several reasons :

1. Neither the secretary nor the appellee had a legal right to retain any of the money received for said stock as compensation. By Sec. 5 of Loan and Homestead Act, Chap. 32, it is provided : "The officers of the company shall consist of a president, vice-president, secretary and treasurer, to be elected at the annual meeting of the board of directors, as may be provided for in the charter and by-laws of the association; provided, that the secretary only shall be entitled to compensation, and in such an amount as may be provided for in the charter of such association." The charter here referred to is evidently what is generally termed the constitution. It is adopted by the stockholders (Section 2). The directors can not change or modify the charter. They must conform to it. "Where the charter or other fundamental law fixes the salaries of any officers, allowance in excess of the same can not be made by the corporation or its directors." Endlich on Law of Building Associations, Section 223, citing various authorities.

Even a promise to pay an extra fee or sum beyond that fixed by law is not binding, though he renders extra services. *City of Decatur v. Vermillion*, 77 Ill. 315. As suggested by Endlich in Section 226, there are strong reasons for applying this rule of law to such associations as this. The charter of the association, by some inadvertence, was not introduced in this case to show what the compensation of the secretary was fixed at, but doubtless the compensation testified to by the secretary as allowed to him before the alleged understanding with the directors as to fees for paid-up stock, was that fixed by the charter. It is fair to assume the statute requiring the compensation of the secretary to be fixed in the charter had been complied with, and that the secretary was being so paid prior to the issue of the paid-up stock.

2. The money so received for paid-up stock, belonging to the association, it had a legal right, for the reasons stated,

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to demand that all of the money should be paid over. This is true, although the issue of paid-up stock was *ultra vires*, which we have no doubt it was under our statute. Having a legal right to make the demand, the association had also the legal right to take any proper steps to enforce it. In any event the threat must be of the unlawful use of process in order to be coercion. *Taylor v. Marcum*, 16 Ill. 93; *Heaps v. Dunham et al.*, 95 Ill. 583; *Compton v. Bunker Hill Bank*, 96 Ill. 307. In this latter case it will be observed the threat was by the corporation by way of resolution. In the case at hand, the directors, as such, made no threats. Some of those who were directors, as individuals, it is alleged, did. It is very questionable whether such talk was admissible to prove the averment of the declaration that the association made threats.

The declarations of an agent of the company, whether incorporated or not, are only admissible when they form part of the *res gestæ*. *Lincoln Coal Co. v. McNally*, 15 Ill. App. 184; *School Directors v. Wallace*, 9 Ill. App. 313; *County of LaSalle v. Simmons*, 5 Gilm. 513. But waiving that question and conceding all claimed by appellee as to threats, there was no abuse of process or threat to do so, under our holding of the legal right to demand this money.

3. No criminal proceedings were begun against appellee. In the case of *Budford v. City of Chicago*, 40 Ill., at p. 420, it is said, "But the court, in reviewing all the English and American decisions on what is or is not a compulsory payment, recognize and affirm the doctrine of the Massachusetts cases we have cited and say: 'We consider, therefore, the doctrine as established, that a payment is not to be regarded as compulsory, unless made to emancipate the person or property from an actual and existing duress imposed upon it by the party to whom the money is paid, and that a payment made under the apprehension, or even menace, of an impending distress warrant, would not render it a payment by compulsion.'"

In the case of *Elston v. City of Chicago*, 40 Ill. 514, it is said: "It is invariably held that a payment is not to be



## Lumbermen's Mutual Ins. Co. v. Bell.

regarded as compulsory unless made to relieve the person or property from an actual and existing duress imposed upon him by the one to whom the money is paid." In *Rendleman v. Rendleman*, 156 Ill. p. 573, it is said: "Nor do threats of criminal prosecution constitute duress when neither warrant has been issued nor proceedings commenced." It is said, however, that appellee was *ex aquo et bono* entitled to this money and in such cases it can be recovered back under an *indebitatus* count. We have already held he was not so entitled to it, for reasons stated. The interest of members in these associations, many of whom are poor and struggling to pay for their homes, is carefully conserved by the statute, which in our judgment, should be strictly enforced by the courts to that end. The directors have no power to fix or enlarge the compensation of the secretary and take from loan or working funds other than as provided by the charter, money to pay him for extra services.

The appellee made a fair and liberal settlement with appellant, voluntarily, of the claim against him, of which he can not now be heard to complain. The judgment is reversed and not remanded.

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**Lumbermen's Mutual Insurance Co. v. Eliza J. Bell,  
Sole Executrix of James Bell, deceased, doing  
Business in the Name of James Bell.**

1. **INSURANCE—Proofs of Loss Sworn to by an Agent.**—A person insured against loss by fire may authorize another by power of attorney to make out for him and swear to the proofs of loss in case of fire.

2. **SAME—Proof of Loss, by Whom Made.**—Where a policy requires the assured to furnish proofs of loss, signed and sworn to by him, the proof should be so signed and sworn to, unless there is some legal excuse for not doing so. Absence from the State at the time of the loss and a failure to return in time, is a sufficient legal excuse, and in such cases the proofs may be signed and verified by his agent having charge of his business.

3. *SAME—What Mistakes and Omissions do not Avoid the Policy.*—Where an executor, wishing to procure an insurance upon the property of the estate, relied upon the agents of the company to effect the same in the name of the estate, but the company, through its agent, with knowledge of the facts, by carelessly omitting to write the words "estate of" in the proper place, issued the policy in the name of such deceased person, no deceit having been practiced, or the hazard in any way increased, it was held not to exonerate the company from liability to pay a loss occurring under the policy, and that an action therefor was properly brought in the name of the executor.

4. *COSTS—For Additional Abstracts.*—In this case, a motion for costs for an additional abstract prepared by the appellee was allowed.

*Power of attorney referred to in the opinion:*

"Know all men by these presents, that I, Eliza J. Bell, of Cobden, in the county of Union, in the State of Illinois, executrix of the last will and testament of James Bell, deceased, have made, constituted and appointed, and by these presents do make, constitute and appoint George T. Adams my true and lawful attorney, for me, and in my name, place and stead, to sign and receipt for moneys paid to me by the following insurance companies for loss incurred at Ullin, Illinois, by fire, June 4, 1891, to wit: Manufacturers Mutual Insurance Company of Batavia, Illinois; Lumbermen's Mutual Insurance Company of Chicago, Illinois. \* \* \*

Giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully to all intents and purpose as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney shall lawfully do or cause to be done by virtue thereof.

Witness my hand and seal this June 25, 1890.

ELIZA J. BELL, (SEAL.)

Sole Executrix of James Bell, deceased."

(Acknowledgment.)

*Assumpsit, on a policy of insurance.* Error to the Circuit Court of Union County; the Hon. JOSEPH P. ROBERTS, Judge, presiding. Heard in this court at the August term, 1895. Affirmed. Opinion filed March 7, 1896.

MYRON H. BEACH and DODD & PICKRELL, attorneys for plaintiff in error.

The furnishing of preliminary proofs, where a loss has been sustained, is a condition precedent, without compliance with which no recovery can be had, and a strict compliance is absolutely essential to recovery. 2 May on Insurance, 1076; 2 Biddle on Insurance, 263.

Regardless of whether or not Iott & Son and Candee were the agents of the insured, the retention of the policy by the insured, without calling the attention of the company to the errors contained in it, estops her to deny that Candee acted without authority in making the representation that James Bell was the insured. *Goddard v. Monitor Mut. Fire Ins. Co.*, 108 Mass. 56.

The plaintiff sued upon the policy, and the court can not alter the contract as therein expressed. *Tibbetts v. Hamilton Ins. Co.*, 3 Allen (Mass.) 568.

However unfortunate this may be for plaintiff, he accepted the policy in its present shape, and can not complain that he has been misled by it. *Barrett v. Union Ins. Co.*, 7 Cush. (Mass.) 175.

In this view of the case the application becomes unimportant, as does also the question whether Gleason was the plaintiff's or defendant's agent. It is decisive of the case that the policy which the plaintiff accepted without objection or attempt to have any mistake corrected can not be applied to the building which was destroyed by fire.

If a third person, without any authority from another person, assumes to act for his benefit in making a contract, and he adopts such acts and accepts the contract, there can be no reason why such person so accepting should not be held to adopt all the acts and representations by which the contract was consummated. He is not bound to accept the acts of such third person, but if he does so he must accept them as a whole. In such case no question of excess of authority can arise, for no authority was given, and the subsequent ratification or adoption is equivalent to a prior command to obtain the contract in the way it was first obtained. In addition to the case already cited, this view is sustained by the following authorities: *Garner v. Man-gram*, 93 N. Y. 642; *Morse v. Ryan*, 26 Wis. 356; *Wilson v. Tunman*, 6 M. & G. 236 (46 E. C. L.); *Fitzsimmons v. Joslen*, 21 Vt. 142; *Carpenter v. American Ins. Co.*, 1 Story 57; *Augusta Insurance Co. v. Abbott*, 12 Md. 348.

As to the nature of the misrepresentation, it is immaterial

whether a disclosure of the actual facts would have caused the company to raise the rate or refuse the risk or not.

The purpose for inserting a warranty by the assured is wholly immaterial to the question. *Anderson v. Fitzgerald*, 24 Eng. Law and Eq. 1; *Allen et al. v. German-American Ins. Co.*, 123 N. Y. 6; *Wilson v. Conway Ins. Co.*, 4 R. I. 141; *Wood v. Hartford Ins. Co.*, 13 Conn. 533; *Protection Ins. Co. v. Horner*, 2 Ohio St. 542; *Deweese v. Manhattan Ins. Co.*, 34 N. J. 243.

If it is claimed that the error in the policy was the result of a mutual mistake the proper remedy is a reformation of the policy in equity. The plaintiff sues upon the policy, and the court can not alter the contract as therein expressed. *Tibbits v. Hamilton Ins. Co.*, 3 Allen (Mass.) 569; *Goddard v. Monitor Fire Ins. Co.*, 108 Mass. 56; *The German Fire Ins. Co. v. Gueck*, 130 Ill. 345; *Keith v. Globe Ins. Co.*, 52 Ill. 518.

Is Candee to be deemed in law the agent of defendant, so that it was bound by his knowledge? The delivery of the policy to Iott & Son, before payment of premium, and the allowance by the company to Iott & Son of a commission, and the sharing by Iott & Son of that commission with Candee, are not facts sufficient to constitute them agents of the company in making application for and issuing the policy in suit. Such acts might, under certain circumstances, make them agents for the sole purpose of delivering the policy and collecting the premium, but for that purpose and for no other. *Lycoming Fire Ins. Co. v. Rubin*, 79 Ill. 402; *Ben. Franklin Ins. Co. v. Weary*, 4 Brad. 74; *Fame Ins. Co. v. Mann et al.*, 4 Brad. 485; *Same v. Same*, 10 Brad. 545; *Newark Fire Ins. Co. v. Sammons*, 11 Brad. 230; *Same v. Same*, 110 Ill. 166; *Kings County Fire Ins. Co. v. Swigert*, 11 Brad. 590; *Security Ins. Co. v. Mette et al.*, 27 Ill. App. 324; *Commercial Ins. Co. v. Ives et al.*, 56 Ill. 402; *Lycoming Fire Ins. Co. v. Ward*, 90 Ill. 545; *Union Ins. Co. v. Chipp*, 93 Ill. 96; *Allen et al. v. German American Ins. Co.*, 123 N. Y. 6; *Mellen v. Hamilton Fire Ins. Co.*, 17 N. Y. 609; *Millville Mutual M. & F. Ins. Co. v. Collerd*, 9 Vroom (N. J.) 486; *Schomer et al.*

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v. Hekla Fire Ins. Co., 50 Wis. 575; Goddard v. Monitor Fire Ins. Co., 108 Mass. 56; Wood v. Firemen's Ins. Co., 126 Mass. 316; Hamblet v. City Ins. Co., 36 Fed. 118, 122 and 123; 1 May on Ins., Secs. 122, 122a, 123 and 213; 2 Beach on Ins., Secs. 1066 and 1067; Sellers v. Com. Fire Ins. Co. (Ala.), 16 So. 798; E. Texas Fire Ins. Co. v. Brown (1891), 18 S. W. 713; E. Texas Fire Ins. Co. v. Blum, 76 Texas 653; 13 S. W. 572.

GREEN & GILBERT, attorneys for defendant in error.

There can be no question but what plaintiff can sustain an action at law upon the policy in question.

Where an instrument, by accident, mistake or design has been made, or is payable, to a person by a wrong or assumed name—any name different from such person's true name—such person need not go into a court of equity to correct the instrument, but may sue thereon at law, in his true name, averring that the instrument was made to him in and by the name appearing therein. O'Brien v. People, 41 Ill. 459; Graves v. People, 11 Ill. 542; N. Y. African Society, etc., v. Varick, 13 Johnson 38; O'Brien v. The People, 41 Ill. 456.

Information as to the death of James Bell was neither "material to the risk," nor avoided the policy. Wood on Fire Ins., Secs. 199, 235, 245; Ins. Co. v. Robinson, 98 Ill. 326.

Defendant did have notice, through its special agents, Iott & Son and Candee. Keith et al. v. Globe Ins. Co., 52 Ill. 518; Commercial Ins. Co. v. Ives, 56 Ill. 402; Union Ins. Co. v. Chipp, 93 Ill. 96, 100; Lycoming Fire Ins. Co. v. Ward, 90 Ill. 545; Thomas v. Fame Ins. Co., 108 Ill. 109; Phoenix Ins. Co. v. Whiteleather, 34 Ill. App. 60.

Defendant company is estopped from claiming Iott & Son and Candee were not its agents. Lycoming Ins. Co. v. Ward, 90 Ill. 549; Indiana Ins. Co. v. Hartwell, 24 N. E. Repr. 100; Daniel's Neg. Instruments (2d Ed.), Sec. 838; Thomas v. Fame Ins. Co., 108 Ill. 110; Herman's Law of Estoppel, Ch. 11, Secs. 320, 321, 328, 336, 480, 482, 484.

The proofs of loss were sufficient in law; or defects were waived, if defective.

They were, in fact, in strict compliance with the policy, under the strict letter of the law. Wood on Fire Ins., Sec. 413, p. 693-695; German Fire Ins. Co. v. Grunert, 112 Ill. 68; O'Connor v. Hartford Ins. Co., 31 Wis. 160; Sims v. State Ins. Co., 47 Mo. 54; Ayers v. Hartford Ins. Co., 17 Iowa 178; Pratt v. N. Y. Cent. Ins. Co., 55 N. Y. 505.

MR. PRESIDING JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

Defendant in error recovered judgment against plaintiff in error for \$2,091.25 damages and costs of suit, for loss by fire on mill property claimed to have been insured by policy No. 5947, issued by plaintiff in error, on April 27, 1890, insuring James Bell against loss or damage by fire to "Bell's Mills, James Bell, Ullin, Ill.," in the aggregate sum of \$2,000, for one year. By the terms of the policy, \$20,000 total insurance was permitted.

No question is made that the amount of damages was too large if plaintiff had the legal right to maintain the suit, but it is urged that the court so erred in its rulings touching the admission of evidence, in giving, modifying and refusing to give instructions, as to require a reversal of the judgment, and finally that the policy insured James Bell against loss, and he was dead at the time policy was issued, hence the policy was void and his executrix could not maintain a suit thereon; also that the proof of loss was not made by plaintiff below, but by her attorney in fact. There was no error in giving the instructions which were given, or in modifying those which the court modified before giving, or in refusing to give those for defendant which were refused. And there was no objection made to, or exception to the reading of the depositions of witnesses Candee, Iott and Williams, and exhibits, and to a few only of the other questions which were objected to, were specific objections made, and the court did not err in its ruling admitting the answers to such questions. The evidence offered

on behalf of defendant to which plaintiff made specific objections, was properly refused by the court. We find no reversible error in the rulings of the court in admitting, or refusing to admit evidence. The proof of loss which the policy provided should be signed and sworn to by the assured was full and accurate, and in form and substance as required by defendant corporation, but it was signed and sworn to by "George T. Adams, attorney in fact for Eliza J. Bell, executrix of James Bell, deceased," and it is claimed that the power of attorney did not authorize Adams to make and subscribe to this proof, and the provision of the policy requiring the proof of loss to be signed and sworn to by the assured not having been complied with, no recovery could be had. We think the letter of attorney which accompanied the proof of loss by its terms gave Adams the power, on behalf of said executrix, to sign and swear to for her, as her attorney in fact, such proof. The evidence shows she was absent from the State when the fire occurred and remained absent for several months thereafter. She had no knowledge of the fire until after it took place, or of what insurance or policies she had, or in what companies. Nor had she in her possession, or seen any of the policies. Adams was the general agent of plaintiff, her general superintendent, having charge of her mill and of the entire business connected therewith. He received and paid for this policy and the other policies, and had possession of them for her and as her agent. He was present at the fire and knew what was burned and the amount of the loss thereby occasioned. No one was better able to make the proof of loss and inform defendant fully and accurately of all the facts which such proof was designed to furnish. Where the policy requires the assured to furnish proofs signed and sworn to by him, the proof should be so signed and sworn to unless there is some legal excuse. His absence at the time of the loss and failure to return in time, is a sufficient legal excuse, and in such case, the proofs may be signed and verified by his agent having charge of his business. *German Fire Insurance Co. v. Grunert*, 112 Ill. 68; *Woods'*

Fire Insurance, Sec. 43. Under the facts proven and the law applicable thereto, a sufficient legal excuse is established on behalf of plaintiff for not signing and swearing to said proof in person, and the same was sufficient when signed and sworn to by her agent, or attorney in fact.

The only question remaining necessary to decide is: Did the defendant in error have a legal right of action as executrix of James Bell, deceased? James Bell died testate January 5, 1889. At the time of his death, Candee, an insurance agent, was carrying for him \$20,000 insurance on this same mill property. In and by his will James Bell devised to his wife, Eliza J. Bell, the legal fee simple title to said mill property, to sell and dispose of in her discretion, and divide the proceeds between herself and children, with authority and special request to her to continue to operate the mill and carry on the mill business after his death until she could sell the same to advantage. He nominated his wife sole executrix, without bond. After Bell's death the business was carried on by Eliza J. Bell, executrix, in the name of "James Bell." All letters, correspondence, checks on bank accounts were signed and addressed "James Bell;" in fact, the entire business was conducted in that name. The death of James Bell, the terms of his will, the real condition of the ownership of the mill property, and that the business was so carried on in the name of "James Bell," were facts well known to Candee, an insurance agent, who was, immediately after Bell's death, directed by the executrix to continue the insurance, and the \$20,000 insurance on the mill property he did have continued. As policies would expire he would send notices addressed to the executrix by her business name, "James Bell," and they would be returned in the same name, with request to continue, and the insurance was continued and policies sent to her in the name "James Bell," Candee knowing that where so addressed it meant Eliza J. Bell, executrix. She paid the premiums upon accounts rendered in that way. When Candee agreed with a person to carry a certain amount of insurance and found the amount was too large to place in his own companies he was in the habit of obtaining policies



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from Iott & Son, in companies they represented, upon applications sent by him to them in pursuance of an agreement between them that upon policies so sent to him they would pay him one-half of the commissions paid to them by the companies issuing the policies. Candee being unable to place all the Bell insurance he had agreed to carry in his own companies, on his own responsibility, on April 8, 1889, wrote to Iott & Son: "Please place one thousand dollars for James Bell's Estate, as per form herewith. Application and survey inclosed, to date April 9th, one year, at  $4\frac{1}{2}$  per cent;" and on April 27, 1889, Candee again wrote to them as follows: "I inclose forms for which please place for Est. James Bell \$2,000 as per amounts specified on forms, for one year, at  $4\frac{1}{2}$  per cent, to date from April 27, 1889."

The forms inclosed in these letters were printed description of property, "Bell's Mills—James Bell, Ullin, Ill.;" and the two letters thus naming "Estate of James Bell" as the assured, accompanied by forms so describing the property, informed Iott & Son of the death of James Bell and the ownership of the property by his heirs or devisees, whose interests were to be insured under the designation of "Estate of James Bell." Policies were sent by Iott & Son, one on April 9, 1889, for \$1,000, and one on May 1, 1889, for \$2,000, as requested, in favor of James Bell, and were sent by Candee on May 2d in a letter to plaintiff, addressed in her business name of James Bell, and stating the amount of the premiums due. Adams, the superintendent, received the policies so sent, forwarded check to Candee for the sum due for premiums, put the policies in the safe without examining them, and Candee did not examine them, but sent them, supposing they were written as ordered in said two letters of April 9th and April 27th; Iott & Son rendered an account to Candee, charging him with said premiums, less one-half of commissions to be paid by the companies to Iott & Son for obtaining the insurance for them, which account Candee paid Iott & Son May 20, 1889. On March 31, 1890, Iott & Son advised Candee by letters that said policies would expire April 9th and April 27th, and asking if renewals

of the same were desired, to which Candee at once replied :  
"Please renew James Bell, expiring 9th;

do. expiring 27th;"

inclosing like forms as were inclosed in former letters of April 9 and 27, 1889, requesting the original insurance for "Estate of James Bell." In reply Iott & Son sent two policies on April 5, 1890, to Candee, one of which was the policy sued on. Neither Iott & Son nor Candee was the general agent for this company, but Iott & Son were acting as regular Chicago local agents of several insurance companies, and had, prior to the issuance of this policy, placed insurance in and received from this company at least six of its policies. The policy in question was applied for by Candee, without consultation with, or request or knowledge of plaintiff. He sent the policy to plaintiff by her business name, was paid the full premium by check, sent the amount, less his share of commissions, and defendant received the premium, less commissions. He was not the agent for plaintiff or for the estate, but simply placed insurance as a regular insurance agent. The policy was not examined by Candee, or plaintiff, or by her superintendent, so that the omission of the words "estate of" before "James Bell" was not noticed, but reliance was placed upon Iott & Son that they had done as directed and named "Estate of James Bell" as the assured. The facts above stated show that not only Candee, but Iott & Son, were each fully informed that James Bell was dead, and as to the ownership of the property desired to be insured, and were directed to name "Estate of James Bell" as the assured. If they, or either of them, were agents of defendant company in this insurance transaction, defendant had all the notice and knowledge concerning the same they had, and was bound by their acts in relation thereto, and this is so, notwithstanding the clause in the policy, "if any broker or other person than the assured have procured this policy \* \* \* he shall be deemed the agent of insured, and not of the company, in any transaction relating to the insurance."

We have no doubt that the proof establishes the fact that

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Iott & Son were special agents of defendant. They procured the policy, delivered it to the plaintiff, collected the full premium due and paid it over to defendant company, less the commissions allowed them by the latter for their services. They were notified James Bell was dead, that the "Estate of James Bell" was the interest to be insured, and the premium was paid for such insurance.

There was no deceit practiced by plaintiff and it was shown the hazard was not increased after the death of James Bell in any degree. Under the facts and the law, the careless omission by defendant, through its agents, to write "Estate of" before the words "James Bell" in the policy is an omission that does not exonerate defendant from the liability to pay the amount recovered. *Lycoming Ins. Co. v. Ward*, 90 Ill. 454; *Union Ins. Co. v. Chipp*, 93 Ill. 96; *Newark Ins. Co. v. Sammons*, 110 Ill. 166; *Mutual Ins. Co. v. Saginaw Barrel Co.*, 114 Ill. 99; *Phoenix Ins. Co. v. Stock*, 149 Ill. 319; *Same v. Hart*, 149 Ill. 513, and cases cited in the opinion, are authorities supporting the views we extend touching the question of special agency, and the liability of the defendant for the acts and omissions of its agent. No good reason is shown for reversing the judgment.

There is also a motion by defendant in error to order the cost of additional abstract to be taxed against plaintiff in error. This motion is sustained and the judgment affirmed, with directions to the clerk to tax, in addition to the other costs against plaintiff in error, the cost of the additional abstract. Affirmed.

**T. B. Rhodes and Ellen Rhodes v. The Missouri Savings and Loan Company.**

1. FORECLOSURE PROCEEDINGS—*Taxes Accruing After Filing Bill.*—A decree for taxes paid by a mortgagee and accruing after the commencing of foreclosure proceedings by him, is proper where the mortgage, making it the duty of the mortgagor to pay the taxes, is made a part of the bill, and the prayer is for an accounting and for general and special relief.

63	77
173a	621
63	77
87	68
88	250
63	77
107	454

2. *SAME—Decrees for Amounts in Excess of that Stated in the Bill.*—Where a bill filed to foreclose a mortgage states the amount due at the time, it is not error to include in the decree a greater amount, where the increase is the result of the accumulation during the interval between the filing of the bill and the hearing.

3. *SAME—Who can not Object for Want of Parties.*—A mortgagor, defendant in a foreclosure proceeding, can not complain because tenants in possession of the mortgaged premises are not made parties to the decrees where his rights are not injuriously affected by such omission.

4. *BUILDING AND LOAN ASSOCIATIONS—Cancellation of Stock in Foreclosure Proceedings.*—In a proceeding to foreclose a mortgage given to a building and loan association, it is proper to provide by the decree for the cancellation of the stock of the mortgagor where he has been credited with the full withdrawal value of the same in reduction of his indebtedness.

5. *FOREIGN BUILDING AND LOAN ASSOCIATIONS—Doing Business in This State.*—The act of June 22, 1893, prohibiting foreign building and loan associations from doing business in this State, without first making certain deposits, etc., does not prevent such associations from taking additional security for loans made before the act went into effect.

6. *USURY—Building and Loan Contracts.*—Contracts of building and loan associations are not usurious under the laws of this State, although providing for premiums in excess of the legal rate of interest.

*Foreclosure Proceedings.*—Appeal from the Circuit Court of Madison County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding. Heard in this court at the August term, 1895. Affirmed. Opinion filed March 7, 1896.

T. T. HINDE and C. N. TRAVOUS, attorneys for appellants.

KROME & TERRY, attorneys for appellee.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The appellee, a building and loan association organized under the laws of the State of Missouri, made a loan to appellant on stock held by him in the association, and took a mortgage to secure the same on real estate situated in Illinois. There being default in the payment of interest, premium and dues, a bill was filed to foreclose the mortgage. Issue was joined, hearing had and decree entered for the sum of \$10,180.60, from which this appeal is prosecuted, and various errors assigned, as follows:

1. That the bill did not allege payment of taxes by

complainant, and yet the court allowed \$122.50 for payment of taxes by complainant after the bill was filed. The mortgage was made part of the bill, which, by its terms, made it the duty of appellant to pay the taxes. On the day of the hearing, appellee requested complainant to pay the taxes, or the land would be sold to pay them. The prayer of the bill was for an accounting and for general and special relief. This relief was consistent with the case made by the bill (*Hopkins v. Snedeker*, 71 Ill. 452) and under the facts disclosed and the bill as framed, it was not necessary to file a supplemental bill to include such payment of taxes. *Brown v. Miner*, 128 Ill. 157.

2. It is alleged as error that the bill only claimed there was due \$9,836.50, whereas the decree entered was for \$10,180.60. This point is not well taken, for the reason the first amount was that due at the time the bill was filed, and the second amount that due at the time the decree was entered. The increased amount was simply the result of the accumulation during the interval between the filing of the bill and the hearing. This was a proper and customary mode of proceeding. The case of *Fergus v. Tinkham*, 38 Ill. 408, relates to a decree which included interest for seventeen days prior to the time alleged in the bill as the time when the interest began to run, and is therefore not in point. In this connection, it is also urged that it was error to include the dues, premium and fines to the date of the decree and the eight per cent additional to such sums. The eight per cent is expressly provided for by the by-laws under which the loan was made, and the appellant was obliged to pay such dues, premiums and fines, as the means provided by the plan of such associations for maturing the stock on which the loan was made. The mortgage expressly provides that appellee "will henceforth well and truly pay to said company or its successors or assigns, on or before the fifteenth day of each month, the sum of sixty cents as a monthly installment on each \$100 of stock above named, and also on the same day the sum of \$45 as monthly interest on said loan, and also the monthly sum of \$45 as premium on said loan, such pay-

ments to continue until each full share of said stock shall be worth, on the books of said company, the sum of \$1,000, according to the by-laws of said company." It is also expressly covenanted that "if at any time default should be made in payment of dues, premium, interest, fines, or either of them, and the same shall remain unpaid for the space of six months, \* \* \* then the whole principal debt shall, at the option of said company, \* \* \* immediately thereupon become due and recoverable."

In this case there was a default for over six months, and the foreclosure was in accordance with the terms and provisions of the mortgage.

3. Appellee objects to the decree because certain tenants in possession were not made parties to the decree. If this was error, appellee could not complain, as his rights are not injuriously affected, the tenants not having a joint interest in the property itself. *Brown v. Miner*, 128 Ill. 154. But the parties referred to became tenants *pendente lite*, after the bill had been filed and after most of the defendants were served with summons.

4. It is also objected that the decree provides for the cancellation of the shares of stock held by appellee on which the loan had been made and which had been assigned to appellant as collateral security. It will be observed that appellee credited the full withdrawal value of these shares of stock in reduction of the indebtedness, which net credit amounted to \$1,432.40. This was the theory on which the bill was framed and to which credit appellee made no objection, and makes none now, but insists, notwithstanding such credit, the stock should not be canceled. This position is not tenable. Appellee can not obtain the benefit of the full withdrawal value of the stock and yet retain it in force. "He can't keep his cake and eat it" at the same time. The effect of this credit to appellee is the same as if he had applied to the company for the withdrawal value of his stock, obtained the money thereon and paid it over to the company in reduction of the indebtedness. No one would claim, in such case, the stock would be retained by appellant, for

to withdraw stock is to cancel it. It is said, in *Endlich on Building Associations*, Sec. 431, the application of the previous stock payments made by the mortgagor, to the extinguishment of the debt, in case of foreclosure, terminates the membership of the mortgagor in the association, and the obligation to continue payment of dues in consequence of membership ceases. He says further: "The borrower has the right so to apply them, and in the absence of any such application by him, the society may make it. But if neither adopt this method, and the whole debt, as it was in the beginning, undiminished by stock payments, be returned to the society, the stock remains intact, and the borrower continuing to hold it, retains his membership. The course pursued of appropriating the results of appellee's regular payments on his stock and the crediting of their full withdrawal value on his indebtedness, apparently by his consent, necessarily canceled the stock.

5. It is objected that the second mortgage is void under the act of June 20, 1893, prohibiting thereafter such associations doing business in this State, without first making a certain deposit and obtaining a certificate of authority from the auditor of the State. This position is not well taken, for the reason that this mortgage was but additional security for a loan made before that act went into effect, and it is questionable, in an executed contract, whether appellant would be permitted to reap the benefit and then deny the power. *Kadish v. G. C. E. L. & B. Ass'n*, 151 Ill. 531.

6. It is urged the contract is usurious. It has been repeatedly held in this State, such contracts are not usurious—*Holmes v. Smythe*, 100 Ill. 420; *Freeman v. Ottawa Building Ass'n*, 114 Ill. 182; *Winget v. Quincy Building Ass'n*, 128 Ill. 84—and they are no longer open to discussion on that ground. The decree is affirmed.

**Joseph Taylor v. Marshall W. Weir, Assignee of Henry Seiter, lately doing business under the name of H. Seiter & Co.**

1. **SET-OFF**—*In Voluntary Assignments*.—A creditor of an insolvent banker can not set off an immatured certificate of deposit issued by such banker, in an action against him by the assignee.

2. **SAME**—*Right not Given by the Statute*.—Section 10 of the act of 1877 concerning voluntary assignments, providing that "any creditor may claim debts to become due as well as debts due, but in debts not due a reasonable abatement shall be made when the same are not drawing interest," gives no right of set-off where the claim was not due at the time of assignment.

**Assumpsit**.—Common counts. Appeal from the Circuit Court of St. Clair County; the Hon. ALONZO S. WILDERMAN, Judge, presiding. Heard in this court at the August term, 1895. Affirmed. Opinion filed March 7, 1896.

WILLIAM A. RODENBERG, JAMES A. FARMER and FRANK PERRIN, attorneys for appellant.

"An assignment of debts due is subject to the debtor's claim of set-off of a debt not yet due." Fry v. Boyd, 3 Gratt. (Va.) 73.

"An equitable set-off existing against a bank when it stops payment is allowable, whether the debt is then payable or becomes due afterward." In re Middle Dist. Bank, 9 Cow. (N. Y.) 413.

"The amount of a partnership deposit with an insolvent banker is a proper subject of set-off in an action brought by the assignee in trust for the creditors of such banker, on a note held by the banker, although such note was not due at the time of the assignment." Smith et al. v. Felton et al., 43 N. Y. 419.

"A plaintiff holding a payable demand against the defendants, could set it off against a note which the insolvent defendant held against him, although such latter note was yet due." Keightly v. Walls, 27 Ind. 384; Snyder's Sons Co. v. Armstrong, 37 Fed. Rep. 18.



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Under the bankruptcy law a claim for purposes of set-off need not be a debt due and payable before bankruptcy. 22 Am. & Eng. Ency. of Law, 259.

TURNER & HOLDER, attorneys for appellee.

Only such demands as constitute a subsisting cause of action can be set off; nothing can be pleaded as a set-off on which a separate action can not be maintained. 22 Am. & Eng. Ency. of Law, 267.

The claim sought to be set off must be one which can be recovered in an action in the same court. Ibid. 273.

A demand, in order that it may be set off, must not only be due at the time when the action is brought, but it must continue due until pleaded and at the time of trial. Ibid. 278.

Where no right of set-off exists when an assignment by an insolvent debtor for the benefit of creditors is made, it can not arise afterward in favor of one indebted to the insolvent estate who is also a creditor. Burrill on Assignments (6th Ed.), 499; Lockwood v. Beckwith, 6 Mich. 168; 72 Am. Dec. 69; 7 Wait's Actions and Defenses, 480, Sec. 6; 8 Wait's Actions and Defenses, 205, 206; Oatman v. Batavia Bank, 77 Wis. 501; 20 Am. St. R. 136; Fuller v. Steiglitz, 27 Ohio State 355; 22 Am. R. 312; Kelly v. Garrett, 1 Gilm. 649; Ryan v. Barger, 16 Ill. 28; Ellis v. Cothran, 117 Ill. 458; Fera v. Wickham et al., 135 N. Y. 223.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

The question presented for consideration arises from the action of the court in overruling the demurrer to the third and fifth replications to appellant's plea of set-off. Appellant undertook to set off certain unmatured certificates of deposit in an action by appellee, and the court held that a party sued by an assignee under the voluntary assignment law, for moneys due the assignor at the time of the assignment, can not set off against the plaintiff's demand a claim not due by its terms at the time of the assignment. But it

is argued that the statute matures all claims against the insolvent debtor's estate as soon as the assignment is made, and that, inasmuch as a claim not due by its terms may, nay, must be presented for allowance within the time fixed by the statute, the same claim, thus matured by the operation of the statute, may be set off against the plaintiff's demand in an action brought by the assignee.

The whole argument of appellant is based upon this construction of the statute, and amounts to a concession that, independently of the statute, the right of set-off would not exist. In view of the authorities on the subject, no other position could reasonably be taken.

In Burrill on Assignments (5th Ed.), Sec. 403, it is said: "It has already been said that an assignee for the benefit of creditors takes the property of the assignor subject to all existing equities. The equities need not exist at the inception of the debt. It is sufficient if they exist prior to the assignment. A claim acquired after the assignment can not be set off against the assignee; nor a liability existing, but not due at the time of the assignment, even if it becomes due before the suit was commenced."

In Oatman v. Batavia Bank, 77 Wis. 501, it was decided that a note held by a bank, but not due at the date of an assignment for the benefit of creditors, is not a proper set-off against the assignor's deposits in a suit for such deposits brought by the assignee.

Among other authorities announcing the same rule of law are the following: Hicks v. McGorty, 2 Duer 295; Martin v. Kunzmuller, 37 N. Y. 396; Neal v. Lea, 64 N. C. 678; Lockwood v. Beckwith, 6 Mich. 168.

Another case, directly in point, is Fera v. Wickham et al., 135 N. Y. 223, decided in 1892. The first part of the opinion is a review of the decisions of the New York courts bearing on the question, for the purpose of harmonizing former decisions with the present one and of preparing the way for a definite formulation of the law. Then Mr. Justice Gray, speaking for an undivided court, says:

"I think the logical and natural extension of the principle

of the decision in *Myers v. Davis* is authoritative in the decision of the present case. The right of set-off must attach at the time of the making of the assignment. It can not arise afterward, for the reason that the claim in favor of the estate has passed to the assignee, and to allow a set-off would be to the prejudice of other creditors. I think the principle to which we should adhere is this: When a party asks to have set off against a demand upon him held by an assignee for the benefit of creditors, a claim against the insolvent estate, it will be allowed, provided his was a claim upon the estate due when the assignment was made; upon the ground that, by reason of the existence of cross-demands at the time of the assignment, which were due (or might have become due at the creditor's election), an equitable adjustment by set-off is made without interfering with the equities of others. But after the estate has passed to an assignee upon a trust to hold for and to distribute among creditors, the former and natural equity disappears in superior equities vesting in the general body of creditors. They are then interested in having equality of distribution, and if a creditor who, when the assignment was made, had no right to any set-off, may be allowed a set-off afterward, he gains a preference. By the intervention of the rights of third persons under the assignment, the equities change with the change in the situation of the original parties; to the misfortune of the creditor holding the demand against the insolvent estate, but nevertheless in accordance with equitable principles, as I deduce them from the decisions."

There are some decisions which take a different view of the law from that above announced; but we are inclined to follow *Fera v. Wickham*, as supported by cogent reasoning and the weight of authority.

It remains to be seen, then, whether or not the tenth section of the act concerning voluntary assignments modifies or changes the law. This section reads as follows:

"That any creditor may claim debts to become due, as well as debts due, but on debts not due a reasonable abatement shall be made when the same are drawing interest, and

all creditors who shall not exhibit his, her or their claim within the term of three months from the publication of notice as aforesaid, shall not participate in the dividends until after the payment in full of all claims presented within said term and allowed by the County Court."

Now it is said that the statute allowing a claim not due to be presented against the insolvent debtor's estate, matures the claim for all purposes, so that it is to be treated as a shield as well as a sword. In other words, it is argued that if the claimant can sue upon his claim before it becomes due by its terms, he can use the claim as a set-off in an action against him by the assignee.

No decision of the Supreme Court, or of any Appellate Court of this State, has been referred to as giving a construction of this statute with reference to the questions now before us. The case of *Wetherell v. Building and Loan Association*, 153 Ill. 361, is not in point. In that case, the deposits of the appellee in the bank, which were allowed to be set off against the demands of the bank's assignee, were due at the time of the assignment, and the section of the voluntary assignment act, above quoted, was not commented upon or construed.

The statute does not say that the debt becomes due by virtue of the assignment, or at the time of the assignment, but it confers a right or privilege upon the holder of an unmatured claim which he would not have enjoyed if the insolvent debtor had made no assignment. The claimant is not authorized to sue the assignee in any court as soon as the assignment is made, but he is given the right to participate in the dividends of the insolvent debtor's estate upon filing his claim within three months after the publication of notice in the manner required by the statute. The maturity of the claim is hastened for one purpose only, and that is to allow the claimant to have a *pro rata* part of the assets, and not to allow him to obtain an advantage over the other creditors. When sued by the assignee, he might well be permitted to set off a claim due at the time of the assignment, for in such case, only the balance due the assignor would have

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passed to the assignee by the assignment. But the statute gives no right of set-off when the claim was not due at the time of the assignment. In such case the claimant must take his place with the other creditors, and content himself with his share of the assets.

But it is argued that there is a striking analogy between the administration act and the insolvent debtor's act with reference to hastening the maturity of claims by operation of the statute, and that the decisions of the Supreme Court under the administration act, if followed here, are decisive of the question under consideration.

Two cases are cited. In *Peacock v. Haven et al.*, 22 Ill. 23, the plea of set off shows that the claims were due before and at the time of the death of the deceased. It was held that if an administrator sues after the two years for filing claims have expired, the defendant may set off an amount due him for which he did not file a claim within the two years, and, if he recovers a balance, he may have the same satisfied out of subsequently discovered assets. In the other case, *Hall v. Hoxsey et al.*, 84 Ill. 616, no question of set-off was before the court. It was held that, under the statute, notes or other demands not due might be allowed against the estate of a deceased person on making a proper rebate of interest. In such case the claim would not be paid in full if the estate should prove insolvent. But under the law, as contended for by appellant, claims not due would be paid in full by way of set-off to the injury of other creditors.

If the Supreme Court has held that claims not due may be allowed as a set off in an action by the administrator of an insolvent estate, the case has not been cited for our consideration. It has been held, however, that in an action to recover a demand accruing to an administrator after the death of the intestate, the defendant can not set off a debt due to him from the intestate in his lifetime. *Newhall v. Turney*, 14 Ill. 338; *Harding v. Shepard et al.*, 107 Id. 264. In *Newhall v. Turney*, it is said: "To allow this to be done would interfere with the proper order of distribution.

It would enable a debtor of an insolvent estate to obtain an unjust advantage. He might, in such case, purchase demands against the estate at a discount, and obtain credit for their full amount on a note given for property purchased at the administrator's sale. Such a course would be in express violation of the statute, which requires the assets of an insolvent estate to be distributed *pro rata* among the creditors."

But it is not necessary to protract the argument. The decisions under the administration act tend to sustain, rather than weaken our conclusion that the demurrer to the replications in this case was properly overruled. Let it be observed, also, that there is this difference between the estate of a deceased person and that of an insolvent debtor: the former may or may not be insolvent, but the latter is always insolvent. The very object of an assignment for the benefit of creditors is to hold the creditors in check, to ward off summonses and attachment writs by which preferences would be secured and property sacrificed, and to preserve the assets in the hands of one who represents the assignor, and yet holds the property to a certain extent in trust for an impartial distribution thereof among claimants. And so we hold that the statute allowing a claim not due to be filed against the insolvent debtor's estate does not mature the claim for all purposes, but only to enable the claimant to have a participation in the *pro rata* distribution of the assets. The judgment is affirmed.

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**Consolidated Coal Company of St. Louis v. John Schneider et al.**

1. **CONTRACTS—Construction by the Parties.**—A party entered into a contract with a corporation to sell it the output of a coal mine, agreeing to furnish a certain number of car loads of coal per week, at a certain price, to be loaded free on board the cars at the mine. The contract did not state which party should furnish the cars, but as the party buying the output furnished the cars for that portion of the coal which was de-

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livered, it thereby placed a construction upon the contract, and could not afterward object.

2. **PLEADING—*Defects Waived—When.***—If a party litigant deems the pleading of his adversary defective, he should demur. Defects are waived by pleading a set-off.

3. **SAME—*Manner of Amending.***—A party amending a pleading should indicate the precise part of it amended, and the place in the plea where the amendment is to be inserted.

4. **SAME.—*Defects, etc.—When Cured by the Verdict.***—When there is any defect, imperfection, or omission in a pleading, whether in substance or form, which would have been fatal on demurrer, if an issue is joined upon it requiring proof of the matters defectively stated or omitted, such defects, imperfections, or omissions will be cured by the verdict.

5. **PRACTICE—*Motion to Dismiss by One Joint Plaintiff.***—The denial of an oral motion by one of several plaintiffs in his own behalf, to dismiss the suit, can not be assigned for error.

6. **EVIDENCE—*Admission by Pleading.***—Where a plea of set-off to a declaration upon a contract shows that the defendant has notice of the contract for the breach of which damages are claimed and by his plea puts the same in issue, the admission of such contract in evidence is not error.

7. **MEASURE OF DAMAGES—*Gains and Profits.***—Under a contract with the owners to operate a coal mine, pay rent for the use of the mine and machinery and royalty for the coal, the owners contracting to take a certain number of car loads of coal each week, delivered on board cars at the mine at a price fixed by the contract, in case of a breach of the contract in failing to furnish cars to take the coal, the owners will be liable for the gains and profits prevented by reason of such failure.

**Assumpsit.**—Breach of contract. Appeal from the Circuit Court of St. Clair County; the Hon. ALONZO S. WILDERMAN, Judge, presiding. Heard in this court at the August term, 1895. Affirmed. Opinion filed March 7, 1896.

## STATEMENT OF THE CASE.

This suit was brought by appellees to recover damages for the breach of a contract between them and appellant, and a verdict for appellees was returned for \$3,500 damages, for which sum and costs judgment against the appellant was entered, and it took this appeal.

By the terms of said contract appellant leased from September 1, 1893, for eleven months thereafter, to the appellees, a coal mine, with all machinery and appliances thereto belonging. Appellees contracted to operate said mine in a workmanlike manner and in accordance with the directions

of appellant's superintendent, so far as the plan of the work is concerned. And to furnish appellant, unless prevented by strikes, or circumstances beyond their control, during the months of September, October, November and December, 1893, and January, February and March, 1894, with an aggregate of thirty-six car loads of lump coal per week, and during the months of April, May, June and July, 1894, an aggregate of twenty-four car loads of lump coal per week, all at a price of sixty cents per ton for screened lump coal, and with all the nut coal produced at said mine, at twenty-five cents per ton, all f. o. b. cars at said mine. It was further provided that appellees should pay appellant as royalty for said coal, and as rent for the use of said mine and machinery, five cents per ton on all lump coal loaded on railroad cars. It was also provided, that any failure on the part of appellees to comply with any part of the contract, should authorize appellant to forfeit and terminate the same, and to enter and take possession of said mine and all machinery and appliances thereto appertaining. And lastly, appellant agreed to receive from appellees the aforementioned amounts of coal, and to pay therefor, on its regular monthly pay days, the sum of sixty cents per ton for all lump coal, and twenty-five cents per ton for all screened nut coal, f. o. b. cars at said mine.

The breach of this contract, as averred in the third amended declaration pleaded to, is: That appellees entered into possession of said mine under the contract on September 1, 1893; that by the construction then and there put on said contract by all the parties thereto, defendant then and there took upon itself the duty and obligation of furnishing plaintiff from time to time the necessary number of railroad cars on which to load said coal, and thereupon it became and was defendant's duty to furnish said cars. That defendant, though often requested, refused to furnish the railroad cars necessary for the plaintiffs to load the full amount of coal to be taken and paid for by defendant during said time, from September 1, 1893, until April 28, 1894, and refused to receive and pay for the balance of said coal, as it



ought to have done under said contract, during the time last aforesaid. And further avers that at all times between said last named dates plaintiffs were ready, able and willing to furnish and deliver to defendant on board the cars, said coal in accordance with the terms and conditions of said contract, and then and there requested defendant to furnish the necessary railroad cars for the loading of said coal, and then and there offered to deliver said coal on board the cars, in accordance with the terms and conditions of said contract, and requested defendant to furnish said cars, and accept and pay for said coal. Yet defendant did not, nor would at any time during the time last aforesaid, keep and comply with the terms and conditions of said contract by it to be kept and complied with during the time last aforesaid, but has refused and still refuses so to do. And by means of the failure of defendant to keep and comply with said contract as aforesaid, plaintiffs have been deprived of, and lost the wages, gains and profits which would have accrued to them under said contract if the same had been kept and complied with by defendant, and were compelled to pay out large sums of money to maintain said mine during the time it was idle by means of defendant's failure as aforesaid. All to the damage of plaintiffs of four thousand dollars.

It is also averred that from April 28, 1894, to July 21, 1894, plaintiffs were prevented by strikes from furnishing the coal by them during that period to be furnished to defendant under said contract; that if plaintiffs had not been prevented from doing so by said strikes, from and after said July 21 and until the expiration of the time mentioned in said contract, they would have furnished defendant the amount of coal required by the contract.

In the original declaration, filed August 25, 1894, the written contract is set out *in haec verba*, and on September 13, 1894, a general demurrer to said declaration was filed, and on October 3, 1894, was sustained and leave to amend given, and on October 4, 1894, first amended declaration was filed, in which also said contract is set out *in haec verba*, and on October 6, 1894, defendant filed its plea of general issue

thereto, and on October 9, 1894, filed a plea of set-off thereto, averring that plaintiffs are indebted to it for damages arising out of the violation of the same contract in plaintiffs' declaration mentioned; that by the terms of said contract it was the duty of plaintiffs to furnish defendant, during the time between the date thereof and July 31, 1894, 1488 car loads f. o. b. cars at the mine, all at a price of sixty cents per ton; all of which defendant was at all times ready and willing to receive and pay for at said price. Yet plaintiffs did not furnish to defendant f. o. b. cars at said mine. 1488 car loads of coal, but during the whole time of said contract, furnished to defendant but 691 car loads of lump coal, and wholly neglected and refused to furnish defendant the other 797 car loads of lump coal at said mine, or at any other place, by means whereof defendant lost and was damaged in the sum of \$10,000, which sum so due from plaintiffs to defendant, exceeds the damages sustained by plaintiffs by reason of the non-performance by defendant of the several promises in the declaration mentioned. Then follows the offer of set-off to plaintiffs out of said sum the full amount of said damages.

On October 12, 1894, plaintiffs filed their second amended declaration for the use of certain persons, and after the averment that on September 1, 1893, "defendant then and there entered into an agreement and contract in writing with the plaintiffs of that date, in words and figures as follows, to wit," is this: Memorandum of an agreement made this first day of September, A. D. 1893, between the Consolidated Coal Company, of St. Louis, party of the first part, and John Schneider, George Lanston, Sr., George Lanston, Jr., John Beaumont, William Henry Beaumont, Levi Beaumont, Jesse Randle, Sr., Jesse Randle, Jr., Charles Rowland, John Erwin, John Beese, Sr., John Beese, Jr., Amos Randle and Joseph Randle, of Birkner Station, Illinois, parties of the second part, witnesseth:

The said party of the first part hereby leases and sublets to the parties of the second part, for the term of eleven (11) months from the date hereof, its coal mine known as

Reinecke No. 1 mine, located near Birkner station, together with all machinery and appliances thereto belonging.

The said parties of the second part contract and agree to operate the said mine in a workmanlike manner and in accordance with the directions of the superintendent of the party of the first part so far as the plan of the works is concerned, and to keep the mine and all the machinery and appliances thereto belonging in good repair and working order, and to return the same at the forfeiture or expiration of this lease in as good condition as when received. And to furnish the said party of the first part, unless prevented by strikes or circumstances beyond their control, during the months of September, October, November and December, 1893, and January February and March, 1894, with an aggregate of thirty-six (36) car loads of lump coal per week, and during the months of April, May, June and July, 1894, an aggregate of twenty-four (24) car loads of lump coal per week, all at a price of sixty (60) cents per ton of two thousand (2,000) pounds, for screened lump coal which shall be free from slate and sulphur; and with all the nut coal produced at said mine, and which must be well screened, at twenty-five cents per ton, all f. o. b. cars at said mine. The parties of the second part also agree that the above stipulated amounts of coal shall be the entire lump coal product of said mine which shall be shipped on railroad cars.

The parties of the second part further agree to pay to the party of the first part as royalty for the said coal, and as rent for the use of said mine and machinery five (5) cents per ton on all lump coal loaded on railroad cars. Said payments to be made on said first party's regular pay days. Railroad weights are to govern as to all coal loaded on cars.

It is further expressly agreed that any failure on the part of the parties of the second part to comply with any part of this contract, shall authorize said party of the first part to forfeit and terminate the same and to enter and take possession of said mine and all machinery and appliances thereto appertaining, with or without process of law.

And the said party of the first part agrees and contracts

to receive from the said parties of the second part, the aforementioned amounts of coal, and to pay therefor on its regular monthly pay days, the sum of sixty (60) cents per ton for all lump coal, and twenty-five (25) cents per ton for all screened nut coal, f. o. b. cars, at the said mine.

The Consolidated Coal Company of St. Louis, by J. C. Simpson, General Manager, Jesse Randle, Sr., John Erwin, Jr., Joseph Randle, Amos Randle, W. H. Beaumont, John Beaumont, Levi Beaumont, John Schneider, John Beese, John E. Beese, C. Rowland, George Lanston, Sr., George Lanston, Jr., Ed. Randle, Jesse Randle, Jr.

And the amount of damages is, that by reason of the failure of defendant to keep and comply with said contract, the plaintiffs "have been deprived of eighty-five days' labor each," and have been deprived of and lost the wages, gains and profits, etc.

To this second amended declaration a special demurrer was filed October 12, 1894, assigning several causes, one of which is: "No contract is set out in the declaration, a mere reference to another pleading being insufficient." The demurrer was sustained, and on the same day the second amended declaration was amended by omitting the words, "have been deprived of eighty-five days' labor each," but in all other respects was unchanged, and on October 17, 1894, said pleas of defendant were extended to this declaration as amended, and issue was joined on these pleas.

CHARLES W. THOMAS, attorney for appellant, contended that a contract may, in cases of doubtful meaning, be interpreted by the acts of the parties but not by what they say, and those acts must not be seriously disputed, but clearly and substantially proved. In every case in which the acts of the parties have been relied upon as interpreting a contract of doubtful meaning, there has been no question whatever that the acts were really performed. This is notably so in the following cases, cited by this court in *Crown C. & T. Co. v. Yoch Min. Co.*, 57 Ill. App. 651; *Alexander*

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v. Barrett, 46 Ill. 226; Parmelee v. Hambleton, 24 Ill. 605; Leavers v. Cleary, 75 Ill. 349.

DILL & SCHAEFER, attorneys for appellees, contended that the construction of this contract, on this point, is not an open question in this court. Crown Coal & Tow Co. v. Yoch Coal Mining Co., 57 Ill. App. 666; Browne on Parol Ev., Sec. 55; Brose's Case, 104 Ill. 212; Hall's Case, 133 Ill. 240. What is the true rule and measure of damages in this case? In Sutherland on Damages, Vol. 1, 130, the author defines the rule to be "the gains prevented, which would have accrued to the contracting parties by a fulfillment of the contract." He says: "By this general rule the party thus injured by a total breach is entitled to recover the profits of the particular contract, which he shows with sufficient certainty would have accrued if the other party had performed. He is entitled to recover proportionately for a partial breach of the contract." In support of this proposition the author cites many cases, and among others, Van Arsdale v. Rundel, 82 Ill. 63.

Where profits are to spring directly from labor which is to be performed, and the plaintiff is prevented from fulfilling his contract by the action of the defendant, he may recover for the loss of the profits which might have been made. Atkinson v. Morse, 63 Mich. 276; Christian Co. v. Overholt, 18 Ill. 223.

MR. PRESIDING JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

On behalf of appellant, it is urged that the trial court erred in denying an oral motion made by defendant's attorney, on behalf of Rowland, one of the plaintiffs, and with his consent to dismiss the suit. This, if an error, is not an error appellant can set up. Our Supreme Court say in Winslow et al. v. Newlan et al., 45 Ill. 147: Hennessy, one of the plaintiffs, entered a motion to dismiss the suit; the other plaintiff resisted the application and the motion was overruled. It may be asked how appellants can as-

sign this for error. They did not enter the motion and it was only a decision against one of the plaintiffs; if they, by collusion, procured Hennessy to enter the motion, then it was a fraud upon Newlan that the court would not aid in consummating. It is insisted also that the contract declared on is not one that needs any interpretation by the acts of the parties thereto. That the words "free on board" mean that the coal had to be loaded on the cars free from all expenses to the buyer, and this could not be done if the buyer had to furnish cars. Hence the interpretation of the contract given by the evidence outside the contract is an interpretation directly contrary to the express provisions thereof and not allowable.

It was averred in the said third amended declaration upon which the cause was tried, "that by the construction put upon the contract by the parties thereto after it was made and when plaintiffs entered into possession of the mine, defendant assumed the duty of furnishing the necessary cars on which to load said coal," and the written contract did not definitely determine which party should furnish them. The case of *Crown Coal Co. v. Yoch Coal Co.*, 57 Ill. App. 666, involved this same question, and this court held, when the appellee sold the output of lump coal, agreeing to furnish not less than a certain number of cars of coal weekly at a certain price, between certain fixed dates, for which appellant agreed to pay at a certain fixed time, and the contract, like the one in this case, did not definitely determine which party should furnish the cars, but appellant furnished the cars for all the coal that was delivered, it thereby placed a construction upon the contract to which it can not now object. It was further held, the amount of damages accruing because appellant did not furnish cars to be loaded and did not promptly take away cars that were loaded, was a question for the jury.

See, also, *Parmalee v. Hamilton*, 24 Ill. 605; *Hall v. Nat. Bank*, 133 Ill. 234; *Leavers v. Cleary*, 75 Ill. 349.

The evidence justified the finding that all the cars were furnished by appellant, and the acts of the parties and the

express promise of appellant's superintendent to furnish cars afforded evidence supporting the averment that by the construction put upon the contract by the parties thereto, appellant assumed the duty of furnishing the necessary cars on which to load all the coal to be supplied under the contract. Another point suggested is that the court erred in permitting the contract to be read to the jury, because it was not set out in the third amended declaration, except by the words, "Here insert said contract as it appears in the original declaration filed in this cause," and on this ground the judgment ought to have been arrested.

If the appellant deemed this mode of pleading defective, it should have filed a demurrer, but instead of so doing it pleaded set-off as before stated, claiming damages "arising out of a violation of the same supposed contract in the plaintiff's declaration mentioned." The precise place for the insertion of the contract is indicated, and it was set up *in haec verba* in the declaration then filed in said cause. In *Bourland v. Sickles*, 26 Ill. 498, it was held that a party amending a pleading should indicate the precise part of it amended, and the place of its application; that the plaintiff should, by letters, figures or characters of some description, have indicated the precise place where it was designed to be inserted. See *Wallace et al. v. Curtis*, 36 Ill. 156, where objection was made to certain evidence which plaintiff was permitted to introduce, but the defendants put in issue that which was omitted in the declaration, and it was held the plaintiff had the right to accept the issue, go to trial on it and introduce the evidence objected to.

The plea of set-off in the case at bar showed that defendant had notice of the contract for the breach of which plaintiffs claimed damages, and said plea put in issue said contract, and the admission of it in evidence was not error. *Moline Plow Co. v. Anderson*, 24 Ill. App. 366; *Gerke v. Fancher*, 57 Ill. App. 651.

In *Kugen v. Kinnan*, 123 Ill. 292, where a motion in arrest of judgment on account of a defect in the declaration was overruled, it was held the verdict cured the defect,

and the rule was stated to be that where there is any defect, imperfection or omission in any pleading, whether in substance or form, which would have been a fatal defect upon demurrer, yet if the issue joined be such as necessarily required on the trial, proof of the facts so imperfectly or defectively stated or omitted, and without which it is not to be presumed the judge would direct the jury to give, or the jury would have given the verdict, such defect, imperfection or omission is cured by the verdict. 1 Chitty's Pl., 7th Am. Ed., 711, 712.

It is manifest that appellees were necessarily required to prove the contract omitted in the pleading before the judge would have directed the jury to give, or the jury would have given the verdict. Hence, under the issue joined, the motion in arrest would not lie upon the ground as claimed by appellant. We think also the proof showed a strike prevailed, and prevented appellees from getting out and delivering coal during the time as averred in said plea of set-off, and furnished a legal excuse under the terms of the contract and absolved them from liability for failure to deliver.

It is said lastly that no damages were legally recoverable, or if any were recoverable, the amount assessed was grossly excessive, and in making the estimate, counsel for appellant bases the profits on the lump coal at twenty-two cents per ton, and says Schneider, the only witness who testified on the question of damages, so testifies, as appears on page 38 of the record.

We have looked at his testimony on that page and find that he testified the profit on nut coal would have been 22 cents per ton, but on lump coal 36 $\frac{1}{2}$  cents per ton.

The number of cars for lump coal which appellant failed and refused to furnish was 513, at 19 $\frac{1}{4}$  tons each, making 10,003 $\frac{1}{4}$  tons at 36 $\frac{1}{2}$  cents, \$3,667.89, and the loss on 87 cars of nut coal, to be furnished by the appellees at \$2.50 per car, \$166.02. Making the total damages as shown by the evidence \$3,834.51.

But the damages assessed were only \$3,500, which was not an excessive assessment, if plaintiffs could legally



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recover for the loss of gains and profits that was occasioned by the failure of defendant to furnish the necessary cars Appellant contends, however, that the appellees could only legally recover as damages for failure to deliver cars, the difference between the market price of such coal so loaded and the contract price.

That the rule is the same as in a case between a vendor and vendee of merchantable articles. We do not so understand the rule applicable to the facts in this case. The contract was something more than for a mere purchase and sale.

It required said appellees to operate said mine in a good and workmanlike manner for eleven months, and by their work therein, produce the coal and pay rent for the use of the mine and machinery and royalty for said coal, and for the breach by appellant in failing to furnish cars, appellees are entitled to recover the amount of gains and profits which the evidence shows with sufficient certainty would have accrued to them if appellant had performed. They have the right to recover for gains prevented and losses sustained by the partial breach of the contract by appellant. 1 Sutherland on Damages, pp. 130-132; Atkinson v. Morse, 63 Mich. 276; Am. Digest, 1890, p. 1006; Id. 1892, p. 1375.

The evidence established, as already stated, the loss of profits to appellees by appellant's breach was greater than the damages assessed; that appellees were ready, able and willing to furnish the coal to fill the cars which they requested appellant to procure and furnish and which it failed to furnish; and we see no good reason for reversing the judgment. Judgment is affirmed.

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**Matilda Rosenberg v. Union Iron & Foundry Company.**

1. NOTICE—*Date Immaterial.*—The date of a notice is not material. The rights of the party giving such notice accrue from the date of the service.

2. APPELLATE COURT PRACTICE—*Objections Not Made Below.*—An objection to the introduction of a notice in evidence not made in the court below, can not be raised in the Appellate Court.

**Petition for a Mechanic's Lien.**—Appeal from the Circuit Court of Madison County; the Hon. BENJAMIN R. BURBOUGHS, Judge, presiding. Heard in this court at the August term, 1895. Affirmed. Opinion filed March 7, 1896.

T. T. HINDE, attorney for appellant.

TRAVOUS & WARNOCK, attorneys for appellee.

MR. PRESIDING JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

Appellee filed its petition as a sub-contractor for a mechanic's lien, under the provisions of sections 29 and 30 of chapter 82 of the statute. The case was heard by the court, and a decree was entered finding the matters alleged in the petition to be true; that defendant, on or about June 19, 1893, contracted with A. B. Corwin to erect for her a brick business house, as in said petition alleged, and said Corwin afterward contracted with petitioner to furnish the iron work for said building, and said iron work was furnished, placed in and became a part of said building, in accordance with said contract, and was by him accepted, and was to be paid for as alleged in said petition; that the price has not been paid, and there is now due under said contract for the same \$334, with legal interest thereon, from the institution of this suit, making the total amount so due \$357.85, for which sum the petitioner is entitled to a lien on said premises, lot 13 in block 68 in Granite City, Madison county, Illinois, in accordance with the statute. It is then ordered, adjudged and decreed that petitioner have a lien on said premises for the sum found due, and that defendant pay petitioner the said sum, with interest from the date of decree, within forty days; and then decrees, in case of default in the making of said payment, the master in chancery shall make sale for cash of said premises, after giving notice by publication in some newspaper, published in said county, of the time, place and terms of sale, and out of the proceeds of such sale pay costs, and pay petitioner said sum of \$357.85, and the interest.

To reverse this decree, defendant took an appeal and brings the record up to this court for review.

The evidence, as shown by the record, justified the finding by the court that appellee furnished, under a contract with the builder, iron work, which became and remained a part of appellant's building on the premises described in the petition, and was accepted by the builder August 5, 1893; that the appellant owed to and promised appellee to pay the amount of the price for said iron work, \$334, on August 23d, and afterward and before September 12, 1893, tried to get appellee to take her note for that sum, payable after the expiration of the time within which the lien must be enforced, which note, so payable, appellee declined to receive; that on September 12, 1893, appellee caused the notice, as provided by Sec. 30, Chap. 82, to be served on appellant. It is said, however, on behalf of appellant, that said notice was not dated, nor was there served with it a copy of appellee's sub-contract with Corwin.

We notice that the only objection made on the trial to the notice was that it was not dated. This was not a good objection. The date of the notice was not material, as the right of appellee accrued from the date of service of the notice. *Wetemkamp v. Billigh*, 27 Ill. App. 545.

It is further urged on behalf of appellant that the work furnished by appellee was defective; that Corwin abandoned his work without good or sufficient reason therefor, before completing the building, and she was thereby put to additional expense in securing its completion; that she did not owe Corwin anything, but he was indebted to her, and hence she was not liable to appellee, nor was the property subject to the lien. The court was justified in finding against appellant on these questions of fact if it preferred to credit the evidence offered by appellee, and to find the iron work was not defective; that the failure of appellant to perform her part of the contract with Corwin justified him in quitting work on the building when he did so, and that she was indebted to him in a large amount for the work he had completed. Appellee fulfilled its contract, enhanced the

value of its building by the iron work it furnished and placed therein. Appellant repeatedly promised to pay, before and after the time notice was served on her, and appellee took the proper steps under the statute to entitle it to the relief decreed.

The decree is affirmed.

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**Illinois Central Railroad Company v. Margaret O'Keefe,  
Administratrix of John O'Keefe.**

1. **COMMON CARRIERS—Contracts with Passengers.**—It is not necessary that there should be an express contract in order to constitute the relation of carrier and passenger, nor that there should be a consummated contract by the payment of fare; the contract may be implied from slight circumstances and seems to depend largely upon the intentions of the parties.

2. **SAME—Persons Riding upon Free Passes.**—A person riding upon a free pass may recover for personal injuries received through the gross negligence of the company.

3. **NEGLIGENCE—Gross Negligence Defined.**—Gross negligence is defined to be the want of slight diligence or care.

4. **ORDINARY CARE—Getting upon a Train While in Motion.**—The fact that a person, to prevent being left behind, got upon the front platform of the baggage car of a passenger train while it was leaving the station, and being unable to gain admission to the car remained there until he was killed, in consequence of a collision with a freight train coming in the opposite direction, remaining so upon the platform having nothing to do with his death, will not necessarily prevent a recovery by his personal representative.

**Trespass on the Case.**—Death from negligence. Appeal from the Circuit Court of Union County; the Hon. JOSEPH P. ROBERTS, Judge, presiding. Heard in this court at the August term, 1895. Affirmed. Opinion filed March 7, 1896.

WILLIAM H. GREEN, attorney for appellant.

WILLIAM A. SCHWARTZ, attorney for appellee; KAREAKER & LINGLE, of counsel.

MR. PRESIDING JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

This suit was brought by appellee as administratrix of John O'Keefe, to recover damages for his death, which it is averred was caused by the negligent operation and running of appellant's passenger train No. 4 and freight train No. 81, whereby said trains ran together, met and collided, near Makanda, with great force and violence, and thereby occasioned a great wreck, and greatly demolished the engines and cars of said trains, and thereby said John O'Keefe, then and there a passenger on said passenger train, using due care for his personal safety, was then and there crushed, mashed and killed in said wreck; that he left surviving him his widow and two minor daughters, next of kin, and by reason of his death they have been and are deprived of their means of support. Damages \$5,000. We have set forth generally, but not in detail, the material averments of the declaration. The plea of general issue was interposed, a trial was had, the jury found defendant guilty and assessed plaintiff's damages at \$3,000. Defendant's motion for a new trial was overruled and judgment was entered for plaintiff, on the verdict, for \$3,000 and costs. To reverse this judgment defendant appealed and brings the record to this court.

The points presented and relied on by appellant as grounds for reversal, are: that the deceased at and immediately before the time he was killed was not exercising ordinary care for his personal safety in endeavoring to avoid the accident; that deceased was not a passenger on appellant's train at the time he was killed; that at the time of the accident deceased had in his possession a free pass containing the condition that the person accepting it assumes all risk of accidents, and agrees that the company shall not be liable under any circumstances for any "injury to the person, or for any loss or injury to the property of the passenger using this ticket; that appellant was not guilty of culpable negligence and the collision of appellant's two trains was not the result of its negligence; that the court below erred in

striking out from appellant's instruction No. 2 the words, "riding on a free pass," and erred in striking out from appellant's instruction No. 4 the words, "while the train was in motion." The exercise of ordinary care for his personal safety by the deceased when killed is averred, and the question is one of fact to be found by the jury, and they were instructed that "the plaintiff can not recover in this case unless they believe from the evidence that John O'Keefe, deceased, at the time of his death and immediately preceding his death, was exercising such care as a reasonably prudent person will always adopt for the security of his person."

But it is said, because deceased got on the train when it was running three or four miles an hour, and got on at the front end of the baggage car, which was provided with steps and a hand rail, and remained on the platform until the collision occurred, which caused his death, he was guilty of such negligence as would bar the recovery. In this conclusion we can not concur. O'Keefe had a contract with appellant to furnish 25,000 ties along its line of road at an agreed price, and received with this contract a pass, containing the conditions before mentioned, and was having ties made and delivered at Makanda under said contract. Mr. Bolder, for appellant, received ties from O'Keefe and paid him for them. O'Keefe was at Makanda the day before he was killed, expecting to meet Bolder there, who would receive and pay him for the ties delivered there. Bolder was not there and O'Keefe returned to his home in Anna, twelve miles south of Makanda, promising his hands to return to Makanda the next morning. His home was about 150 yards east of the railroad, and 350 yards north of the depot at Anna. When train No. 4 reached the depot, deceased was at breakfast and was told by his wife she heard the train at the depot; he at once started in a run toward the depot. He ran west to the railroad and thence south along the east side of track toward the depot, but the train had started and when he met it, it was running three or four miles an hour. The engineer and conductor saw him on the east side of the track, and saw him get on the steps of the platform on the north end of the first car he

reached. This end of the car had steps, platform and door into the car, the same as a passenger coach. All the other cars on the train were vestibuled. He, no doubt, tried to open the car door, but found it locked and then stood with back against the door as the train passed his house in view of his wife. Afterward he sat down on the platform, facing the west, and was found dead in that position after the collision, with one hand at the guard rail of the car, which was a baggage car. He was killed by the collision of appellant's trains No. 4 and No. 81, the first being a north-bound passenger and the latter a south-bound freight. The collision occurred about ten miles north of Anna and about 7 o'clock A. M. The facts certainly would justify the jury in finding that the deceased exercised ordinary care. His business required him to be at Makanda that morning. No other train could then have carried him there. Its speed was so slow when he boarded it that he could and did get on with perfect safety, and at a place most accessible to him under the circumstances in which he was placed, and there was no evidence to show he did any negligent act while on the train. A prudent business man, under like circumstances, in order to meet an appointment, would have in all probability done as deceased did, and in our judgment would in so doing have acted with ordinary care. Due care may be inferred from circumstances in evidence. *C. & A. R. R. Co. v. Carey*, 115 Ill. p. 119, and many other cases in our Supreme Court so hold.

That deceased was a passenger on appellant's train at the time he was killed, we think was also proven.

The contract is implied, when one takes passage with a common carrier, that he shall pay a reasonable price for being carried, and that the carrier shall exercise due care, skill and diligence in transporting him safely and speedily to his journey's end, and it is not necessary to prove an express contract, or actual payment. *Frink et al. v. Schroyer*, 18 Ill. 419, and cases cited there. It is not necessary that there be any express contract, in order to constitute the relation of carrier and passenger, nor that there should be a consummated contract. The contract may be implied from

slight circumstances, and it need not be consummated by the payment of fare. The whole matter seems to depend largely upon the intention of the person at the time he enters the car. *N. C. Street R. R. Co. v. Williams*, 140 Ill. 228, and cases there cited; *Hutchinson on Carriers*, Sec. 565.

The evidence shows that O'Keefe was not attempting to steal a ride, but his actions in meeting the train and getting on as he did, in the presence and sight of the conductor and engineer, indicated his intention to board the train as a passenger. The conductor admits he would have permitted O'Keefe to ride in the baggage car, and that likely he testified at the first trial O'Keefe had ridden in the baggage car time and again, and that he (the conductor) started to the baggage car to see about the man he saw get on there at Anna; that the conductor believed O'Keefe to have boarded the train and was on it as a passenger, was fairly inferable by the jury when they consider all the evidence.

Under the evidence and the authorities cited, we hold that the evidence established the fact that O'Keefe became and was a passenger, and appellant owed him the duty of exercising due care, skill and diligence to transport him safely. The contention that because deceased had a pass with the conditions mentioned, appellant was absolved from liability for the killing, is not tenable. In the case of *J. S. E. Ry. Co. v. Southworth*, 135 Ill. 253, Southworth was a passenger, being carried on an annual pass with similar conditions, and a like contention was set up by the railroad company, and it was held he could recover by proving he received his injury through the gross negligence of the defendant, and the court further held that gross negligence was "the want of slight diligence or care," and an instruction asked for by defendant, "that gross negligence is defined by the law to be willful or intentional negligence," was held to have been properly refused. See, also, *Hutchinson on Carriers*, Sec. 566. In the case at bar, the collision which caused the death was the result of appellant's negligence, and was undoubtedly gross.

It is further said that the collision was the result of an unavoidable accident, and "the evidence abundantly shows



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there was nothing that is ordinarily called negligence chargeable to appellant." The collision was brought about by the order of appellant's proper officer to the agent at Makanda that "No. 4 will run an hour late, Mounds to Makanda." This order was repeated back to the train master, who sent it from Centralia, and O. K'd there and made complete, and immediately thereafter one copy was delivered to the conductor and one to the engineer of appellant's freight train No. 81, then at Makanda. No. 81 had orders to run one hour on the time of No. 4, and pulled out at once south, and collided with No. 4 running north, which was on time and not late, about two miles south of Makanda. This collision, thus carelessly and negligently caused by appellant, resulted in the death of O'Keefe.

The modification of defendant's instruction by striking out the words "riding on a free pass" was not error that ought to reverse this judgment, and so with the modification of defendant's instruction, by striking out the words "while the train was in motion," was entirely proper. It was not claimed, nor was it a fact, that getting on the train "while it was in motion" had anything to do with the death of O'Keefe.

We find the evidence sustains the verdict, and no errors appear requiring the reversal of the judgment, which is therefore affirmed.

MR. JUSTICE SAMPLE dissents.

On the authority of *Abend v. T. H. & I. R. R. Co.*, 111 Ill. 202, *Galena & Chicago Union R. R. Co. v. Fay*, 16 Ill. 558, and cases there cited, in my judgment, this case should be reversed.

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**William A. Lynch, Receiver of C. Aultman & Co., v.  
Wilbur Naylor and Henry Naylor.**

1. *CHATTEL MORTGAGES—Effect of Purchase by Mortgagee.*—Where the mortgagee of mortgaged chattels takes possession of the same under the mortgage and sells the same to himself, such action will be a satisfaction of the mortgage indebtedness, if the property so taken is worth

an amount equal to the debt and all proper costs and charges at the time of the sale.

2. *SAME—Sales by the Mortgagee to Himself.*—When a mortgagee undertakes to sell the mortgaged chattels to himself he becomes liable to account to the mortgagor for the actual value of the same.

3. *SAME—Construction of Clause Authorizing the Sheriff to Sell.*—Where a chattel mortgage contains a clause authorizing the sheriff to sell, etc., and also a clause authorizing the mortgagee to purchase at his own sale, it is manifest, when the whole power of sale is considered, that the parties contracted with reference to section 11, chapter 95, R. S., providing for such sales by the sheriff.

4. *CHANCERY PRACTICE—Decrees Pro Confesso on Default.*—A court of chancery is not necessarily bound to render a decree against a party because the bill has been taken as confessed against him for want of an answer.

**Bill to Foreclose a Mortgage.**—Error to the Circuit Court of Wabash County; the Hon. EDMUND D. YOUNGBLOOD, Judge, presiding. Heard in this court at the August term, 1895. Affirmed. Opinion filed March 7, 1896.

MUNDY & ORGAN, attorneys for plaintiff in error.

J. M. CAMPBELL, attorney for defendants in error.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

Plaintiff in error filed a bill in the Circuit Court of Wabash County, to foreclose a mortgage executed by Henry Naylor to secure the payment of five promissory notes made by himself and Wilber N. Naylor, for the purchase money for a separator and stacker sold to them by C. Aultman & Company. The notes were otherwise secured by a chattel mortgage on the separator and stacker and on a certain threshing engine.

Henry Naylor answered, alleging that the notes had been fully paid. The record shows that plaintiff in error, the receiver of C. Aultman & Co., took possession of the property described in the chattel mortgage, and sold the same to himself as such receiver for \$125, by a certain constable who was acting at the time as his agent. The evidence shows that the property so purchased was worth more than the amount due on the notes, together with all proper costs

and charges, at the time of the sale. This being true, the notes were satisfied if the sale was not made in conformity with the provisions of the power of sale contained in the chattel mortgage. *Waite v. Dennison*, 51 Ill. 319; *Jones on Chattel Mortgages*, Sec. 806. And if the notes were satisfied, the court did not err in dismissing the bill.

The question thus presented for decision involves the construction of the power of sale, which is substantially as follows:

"The mortgagees shall have the right to take immediate possession (of the property), wherever found, without process of law; and to remove, sell and dispose (of the same) at public auction, after ten days notice of the time and place of sale, with a description of the property; notices to be (posted) in three public places in the vicinity of the sale; or a private sale, with or without notice, for cash or credit, as the mortgagees may elect; and the mortgagees may become purchasers at such sale, and out of the moneys so arising retain all charges and pay all prior liens thereon, and retain the amount due on said notes, and render the balance to the mortgagors, which shall be a perpetual bar in law and equity against the mortgagors; and the said mortgagors do hereby authorize the sheriff of the county of Wabash, and State of Illinois, upon the request of the legal holder of said promissory notes, to execute the power of sale herein granted to said C. Aultman & Co. (mortgagees), its successors, assigns, agents or attorneys."

Where the mortgagee desires to become the purchaser, must the sale be made by the sheriff under the terms of the foregoing power? If the question be answered in the negative, then the clause authorizing the sheriff to make the sale is meaningless. If the mortgagee may sell to himself, at public or private sale, with or without notice, he may call upon the sheriff, or any other official or person, to act as his agent, without a clause in the power specifically naming the sheriff. Or, he may go to his closet and commune with himself on the subject, and then, having sold to himself at his own price, come out into the sunshine and announce the result.

It could not have been the intention of the parties to make such a monstrous and one-sided contract. While the right of the mortgagee to purchase precedes the clause authorizing the sheriff to sell, yet, when the whole of the power of sale is considered, it is manifest that the parties contracted with reference to section 11 of chapter 95 of the statutes, which section is as follows :

"It shall be lawful for the mortgagor of real estate or personal property to insert in his mortgage a clause authorizing the sheriff of the county in which the property, or some part thereof, is situated, to execute the power of sale therein granted to the mortgagee or his assigns or legal representatives, in which case the sheriff, at the time of such sale, of such county, may advertise and sell the mortgaged premises pursuant to such power, and may execute all proper conveyances of the property so sold, in the name of and as the attorney in fact of the mortgagor; and at any sale made as aforesaid, the mortgagee, his assigns or legal representatives, may fairly and in good faith purchase the property, or any part thereof."

Thus by the express agreement of the parties, the right to execute the power of sale was reposed in the sheriff. If the sale had been made by the sheriff, the title would have passed to the mortgagee for the amount of the bid, provided the property was purchased fairly and in good faith. But when the mortgagee undertook to sell to himself, he became liable to account to the mortgagors for the actual value of the property, as he would have been if no execution of the power of sale had been attempted.

But it is contended that inasmuch as the bill was taken as confessed against Wilber N. Naylor for want of an answer, it was the duty of the court to render a decree against him. There is no merit in this claim. The bill was filed to foreclose a real estate mortgage to which Wilber N. Naylor was not a party. The only liability of Wilber N. Naylor would have been on the notes for the amount remaining unpaid after a sale of the real estate. But the court properly found that the mortgage could not be foreclosed for the reason

that the notes had been fully paid, and therefore dismissed the bill. There was no deficiency, and consequently no liability on the part of Wilber N. Naylor.

A motion to reverse the decree *pro forma* under rule 31, because the briefs of defendant in error were not filed within the time required by paragraph 1 of rule 29, has been reserved for the final disposition of this cause. Rule 31 is as follows: "If the defendant in error or appellee shall fail to file his brief in compliance with these rules, the judgment or decree will be reversed *pro forma*, unless the court, on examination of the record, shall deem it proper to decide the case on its merits." On examination of the record, we have thought it proper to decide the case on the merits. But this is not to be regarded as a precedent in other cases, in which it may be considered proper to make a strict application of the rule. The decree is affirmed.

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**The People, etc., for the use of Henrietta Kaiser, v.  
Martin Medart, Aaron Baer and Amson Baer,  
Partners as Baer Brothers, and  
Frank C. Espenhain.**

1. **GUARDIANS—Appointment for Non-Resident Wards.**—Under our statute, it is only when a minor is a non-resident that an estate here is necessary to give the County Court authority to appoint a guardian.

2. **SAME—When the Order of Appointment does not Follow the Petition.**—An order appointing a guardian of the person and estate of a minor where the petition, bond and letters relate to a guardianship of the estate only, is good in cases relating to the estate and where the guardianship of the person is not involved.

3. **SAME—Order of Appointment—Collateral Attack.**—An order appointing a guardian, not void for want of jurisdiction of the court making it, can not be collaterally assailed.

4. **SAME—When Estopped to Deny the Receipt of Money.**—When a guardian receives money as such, irregularities in his appointment or in the receipt of the money are no defense in an action against him individually or on his bond.

5. **COUNTY COURT—In Matters of Probate.**—The County Court, having full jurisdiction of matters of probate and guardianship, is a court of

limited but not of inferior jurisdiction. It is a court of record and its judgments are to be upheld by the same presumptions applicable to the judgments of other courts of record.

6. ADMINISTRATION OF ESTATES—*Effect of Final Settlement.*—Where a County Court makes an order of final settlement of an estate and discharges the executor, such action involves a consideration and approval of payments made by the executor, and if the court has jurisdiction to declare the estate settled, such payments are thereby ratified, but if the court is without jurisdiction, the order is void. The remedy for payments made without legal authority is by an action at law upon the executor's bond, and not in equity.

**Bill for Relief.**—Error to the Circuit Court of St. Clair County; the Hon. ALONZO S. WILDERMAN, Judge, presiding. Heard in this court at the August term, 1896. Affirmed. Opinion filed March 7, 1896.

WM. WINKELMANN, attorney for plaintiff in error.

MARSHALL W. WEIR, attorney for defendants in error.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

The bill in this case was filed in the name of the People of the State of Illinois, for the use of Henrietta Kaiser, against Martin Medart and the sureties on his bond, as executor of the last will and testament of Caroline Kaiser, deceased.

Caroline Kaiser died testate, on March 13, 1888, at St. Clair county, Illinois, leaving in that county considerable property, both real and personal, which passed to her son and six grandchildren by the operation of her will. Plaintiff in error admits that the estate was faithfully administered in every particular, except as to the sum of \$2,000, which was paid by the executor, on August 14, 1890, to E. O. Lindeman, of Dallas, Texas, who was the stepfather of Henrietta Kaiser.

In 1885, when Henrietta was ten or eleven years old, she moved to Dallas, Texas, and lived there, with her mother and stepfather. In 1888, Lindeman attempted to have himself appointed guardian of Henrietta, but the required bond was not given and the proceeding was abandoned. In

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August, 1890, when Henrietta was over fourteen years of age, and empowered by the laws of Texas to choose her own guardian, an order was made by the County Court of Dallas County, appointing Lindeman guardian of her person and estate, and requiring him to give bond in the penal sum of \$5,000. The bond was given and approved, the oath required by the statute was taken, and letters of guardianship were duly issued. Afterward Martin Medart, as executor, paid to Lindeman, as guardian, the \$2,000 hereinbefore mentioned, which was part of the personal property bequeathed to Henrietta Kaiser by her grandmother, Caroline Kaiser. It is urged by the plaintiff in error that the appointment of Lindeman as guardian was void, and, to say the least, not operative as to property in Illinois, and that Medart, as executor, paid the said sum of money to Lindeman without so much as an order of the County Court of St. Clair County, Illinois, to give color of authority for the payment. The aid of a court of chancery is invoked on the ground that an order has been made by the County Court of St. Clair County approving the executor's report of the final settlement of the estate, and discharging him from his trust as executor. It is said that this order stands in the way of an action at law on the executor's bond, and that plaintiff in error's only remedy is in a court of equity.

Many are the reasons presented as showing the invalidity of the appointment of Lindeman as guardian.

The first point is, that the County Court of Dallas County had jurisdiction to appoint a guardian of the person of Henrietta Kaiser, but not of her property, which was situated, as it is said, wholly within the State of Illinois.

But the County Court of Dallas County did not undertake to appoint a guardian to manage and control the ward's property in this State. The ward lived in Texas. Moneys belonging to her could be paid to none but a guardian. The settlement of the estate of Caroline Kaiser could not be perfected till these moneys should be transferred to such a custodian. Under our statutes, it is only when a minor is a non-resident that an estate here is necessary to give the County

Court authority to appoint a guardian. *Barnsbach v. Dewey*, 13 Bradw. (Ill. App.) 581. The statutes of Texas, which are in evidence, are susceptible of the same construction.

It is also said that the order is void because it appoints Lindeman guardian of the person and estate, when the petition, bond and letters relate to a guardianship of the estate only. Manifestly, such an order, thus fortified, would be good as to the estate, and the guardianship of the person is not involved in this case. *West Duluth Land Co. v. Kurz*, 45 Minn. 380.

Another point presented is that Henrietta, though more than fourteen years of age, did not choose her own guardian, and that no proper notice of the proceeding was given. The order of appointment recited that due and legal notice was given, and that the written request of the minor was filed, and these findings are not successfully contradicted by other parts of the record. We are aware of the fact that such a contradiction is assumed in the argument, but we consider the assumption as wholly unwarranted.

The statutes of Texas in evidence provide that if the minor be fourteen years of age, he may, by a writing filed with the clerk, waive the issuance of a citation, and make choice of a guardian, or may select his guardian in open court in person, or by attorney, in which case the person selected, if qualified, shall be entitled to be appointed guardian. If other, or further notice should be required, the order of the court in this case shows that it was given. This order is not void for want of jurisdiction, and can not be collaterally assailed. The County Court, having full jurisdiction of matters of probate and guardianship, is a court of limited, but not of inferior jurisdiction. It is a court of record, and its judgments are to be upheld by the same presumptions applicable to the judgments of other courts of record. *Propst v. Meadows*, 13 Ill. 157; *The People v. Gray*, 72 Id. 343; *Bostwick et al. v. Skinner et al.*, 80 Id. 147; *The People v. Seelye*, 146 Id. 189; *Ex parte Burkhardt*, 16 Tex. 470; *Lyne v. Sanford et al.*, 82 Id. 58; *Davis v. Hudson*, 29 Minn. 27; *Johnson et al. v. Beazley*, 65 Mo. 250.



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It is also alleged that proper proceedings were not taken in this State to justify the executor in paying the money in controversy to a foreign guardian. It appears, however, that the estate was finally settled, and the executor discharged. This involved a consideration and approval of the payment in question. If the County Court of St. Clair County had jurisdiction to declare the estate settled, the payment to Lindeman was thereby duly ratified; if the court did not have jurisdiction, the order of final settlement was void, and the remedy at law by an action on the executor's bond is adequate, and chancery has no jurisdiction.

Whether the foregoing positions are correct or not, it is certain that the record fails to show any loss to plaintiff in error which would justify the interposition of a court of equity. Lindeman received the money and his bond is good, for anything appearing to the contrary from the evidence.

The record does not show that Lindeman is not personally financially responsible. Irregularities in his appointment, or in the receipt of the money, would be no defense in an action against him individually or on his bond.

It was held in *Portis v. Cummings*, 21 Tex. 265, that where a party receives money as guardian he will not be allowed to assert that he was not the rightful guardian, and thus avoid payment to the person entitled to the money. It was held in *Andrews v. Avery et al.*, 14 Gratt. 229, that if an administrator, appointed in Virginia, whose intestate lived and died in North Carolina, and left no estate in Virginia, goes to North Carolina, and without qualifying there, takes possession of the assets, and takes them to Virginia, his sureties in Virginia are liable for the faithful administration of those assets.

The court very properly rendered a decree dismissing the bill, and that decree is hereby affirmed.

**John Colp v. William Halstead.**

1. **POUNDS—Location of.**—A pound located by the county commissioners will continue to be the proper place to impound stock until changed by the proper authorities.

2. **SAME—Fees for Impounding Cattle.**—In counties not under township organization a pound master can only be entitled to charge fees for his services as provided for by the order of the county commissioners.

3. **SAME—Fees, a Legal Liability.**—A claim for fees for impounding cattle is based upon a legal liability, and the facts creating such liability must be shown.

**Action for Pound Fees.**—Appeal from the Circuit Court of Williamson County; the Hon. ALONZO K. VICKERS, Judge, presiding. Heard in this court at the August term, 1895. Reversed and remanded. Opinion filed March 7, 1896.

CLEMENS & WARDER and GEO. A. HENSHAW, attorneys for appellant.

DUNCAN & RHEA, attorneys for appellee.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

This suit was brought by appellee as pound master of eight mile precinct, in Williamson county, to recover fees for taking up and impounding appellant's stock. He recovered judgment therefor, from which this appeal was taken. At the November election, 1890, this precinct voted to restrain stock from running at large. At the March meeting, 1891, the county commissioner canvassed the vote, and under the provision of section 8, chapter 8, of statutes, appointed a pound master and established a pound. The pound master so appointed soon resigned, and at the May meeting, 1891, of the county commissioners, another pound master was appointed and the following order entered: It is ordered by the board that the said John F. Council build and prepare a pound near the center of the north side of the N. W.  $\frac{1}{4}$ , S. W. qr. of Sec. 15, in T. 9, S., R. 1, E. of 3d P. M., said inclosure to be about one acre, and when com-

pleted said piece of land is by order of the board hereby established as a pound for said eight mile precinct.”

At each of said meetings the fees of the pound master was fixed. Section 8, chapter 8, *supra*, provides that when a vote is so taken restraining domestic animals from running at large “it shall be the duty of \* \* \* the county commissioners \* \* \* as soon as a vote is declared in the election to be hereafter held, to select and prepare a suitable pound, appoint a pound master and fix the amount of his fees and charges, which shall remain as fixed until the next annual election, at which time the same may be altered, changed or amended by a majority vote of the electors present, who shall at the same time elect a pound master for the ensuing year.

The appellee was elected pound master by this precinct, at the November election, 1894, and in a few days thereafter took up the stock of appellant, five head of mules, and instead of taking them to the pound provided by the order of the commissioners temporarily put them in the lot of a Mr. Owen, and then, at the request of the wife of appellant, brought them to their owner and put them in a lot there. The mules had broken out of an inclosure that was surrounded by a good and sufficient fence, and were not gone from the premises but a short time until they were returned as above stated.

The wife of appellant told appellee her husband would pay the fees, but on seeing him the next day appellant denied legal liability, but offered to pay appellee personally for his trouble a sum less than the fees claimed; this offer being refused this suit was brought.

It is clear the wife had no right to bind appellant by her promise to pay the fees of appellee, and the suit is not brought on such promise, but the action is based on the statutory liability. The order of the commissioners in regard to fees is as follows: “And in addition to said fees (for care of stock per day) said pound master shall be allowed and he is hereby authorized to charge and collect from the owner of the stock impounded the sum of fifty cents for hunting up and driving to pound per head horses or cattle.”

The appellee testified he had no suitable place to impound the stock, as he had been but recently elected and that the custom was for each pound master to build his own pound. The evidence shows a place for a pound was located and ordered to be prepared.

Section 8 evidently contemplates that a place shall be selected by the proper authorities, so that all may know the location of the pound. Its location is not left by the law to the discretion of the pound master. We hold that the pound being located by the commissioners would continue to be the proper place to impound stock, until changed by proper authority. There is no evidence showing such change, but the evidence of appellee shows that he did not intend to use the one established. His idea was that the location of the pound was determined by the location of the pound master. Doubtless the proper authority could so locate the pound, but some action must be taken evidencing such change other than the mere change of pound masters. The appellee, under the statute, could only be entitled to charge fees for services provided for by the order of the commissioners, there being no evidence of any change therein by a vote of the precinct. The services, for which fees were authorized to be claimed, were for "hunting up and driving to pound" the appellant's mules. The appellee did not attempt to drive them to the pound that was fixed by authority. The claim being based on a legal liability, the fact creating such liability must be shown. It has not been done. We are constrained to reverse and remand this cause.

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**German Insurance Co. v. Joseph Bear, Administrator.**

1. *INSURANCE—Proof of the Value of Property Destroyed.*—The value of insured property as stated in the proofs of loss does not stand for proof of the value of such property on the trial of an action upon the policy. Such value must be shown by other evidence.

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German Ins. Co. v. Bear.

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**Assumpsit**, on an insurance policy. Appeal from the County Court of Clay County; the Hon. BEN. HAGLE, Judge, presiding. Heard in this court at the August term, 1895. Reversed and remanded. Opinion filed March 7, 1896.

JOHN LYNCH, JR., attorney for appellant.

B. D. MONROE and D. C. HAGLE, attorneys for appellee.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

This suit was brought on a fire insurance policy, to recover a loss occasioned by fire, and judgment was obtained for the amount claimed.

The defendant filed the general issue and special pleas, setting up (1) that proofs of loss were not furnished as required by the terms of the policy; (2) that the insured made false and fraudulent representations as to the ownership of the property insured and of the title to the land on which the building insured was situated; (3) that the title to the personal property insured had been changed in a certain manner since the insurance, which made the policy null and void. Replications were filed to these several pleas; to the last plea that the property descended to the widow and heirs of insured, and thereafter, with knowledge of the fact, the defendant had received and accepted the premium due on said policy, which was alleged to be a waiver of the forfeiture. A demurrer to this replication was overruled, on which ruling error is assigned. The demurrer should have been sustained, for this reason, if for no other, that the replication did not meet the issue presented by the plea as to the change of title there averred, which was to the effect that the widow had taken the same as a part of her award on the administration of the estate.

This question is not, however, before this court, for the reason the appellee remits the amount of the judgment entered for the value of the personal property, conceding thereby there can be no recovery in this case for such property. The appellee remits \$223, the amount claimed in the proof of loss, which proof of loss is the only evidence in this record of the value of such property.

This court, however, can not assume that is the value as found by the court, for the reason the value of property as stated in the proof of loss does not stand for proof of the value on the trial; that must be shown by other evidence. *The Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388.

There is no other proof in this record than the proof of loss of the value of the dwelling destroyed by fire, and therefore the judgment will have to be reversed. It is deemed proper to say, however, in case this suit should be tried again, (1) that appellant should have objected to the proof of loss furnished, if it was not satisfactory: *Continental Ins. Co. v. Ruckman*, 127 Ill. 364; (2) that the evidence does not show there were false or fraudulent representations as to the ownership of the dwelling or of the title to the land on which it was situated. There should, however, be additional proof as to the loss of that deed made by Joseph to Oliver Bear. Judgment reversed and cause remanded.

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**Lizzie B. LeCrone, Executrix of the Last Will and Testament of Albert W. LeCrone, Deceased,  
v. A. J. Worman.**

1. **MASTER'S SALES**—*When Not to be Set Aside*.—Where property sold by a master in chancery is present at the sale, so that bidders can see what is offered, and there is no evidence tending to show that any deception was practiced so as to mislead purchasers, the sale is properly confirmed.

**Bill to Settle a Partnership**.—Appeal from the Circuit Court of Effingham County; the Hon. SILAS Z. LANDES, Judge, presiding. Heard in this court at the August term, 1895. Affirmed. Opinion filed March 7, 1896.

R. C. HARRAH, E. N. RINEHART and B. F. KAGAY, attorneys for appellant.

WRIGHT BROTHERS and WOOD BROTHERS, attorneys for appellee.

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LeCrone v. Worman.

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MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The facts in this case in brief are, that January 1, 1882, the appellee and Albert W. LeCrone formed a partnership in the abstract and real estate business, which continued until September 1, 1890, when the firm was dissolved by agreement, but no settlement made of their affairs. In December, 1890, LeCrone died, and appellant was appointed administratrix of the estate. She filed a bill for an accounting, etc., and on the 2d day of November, 1893, a decree was entered, by agreement of the parties, that all chattel property mentioned in inventory, attached to complainant's bill, including one tract index (W. C. LeCrone) three tract indexes (Brady's), one plat book and abstract index, and two abstract books proper, except two horses, a single buggy and set of double harness, the title to which is in controversy, be sold at public vendue, to the highest bidder, on terms fixed, part cash and part on time; that the parties to the suit be permitted to bid at the sale.

On December 1, 1893, the said abstract books above named were sold to complainant for the sum of \$2,200, and she took and retains possession thereof. However, before furnishing security for the deferred payments, on December 9, 1893, she served the special master, who made the sale, with a written notice to the effect that she had not received all the abstract books of said firm, and that she was entitled to the pencil minutes of records made by said firm, and particularly a "Patent Numerical Tract Index," described in the inventory and notice of sale as one plat book and abstract index, which said Worman claimed now as his individual property; that if the master could not deliver to her said property so demanded, notice was given that proceeds of bid were to be held in escrow until the court could determine the question, when, if such property was awarded to her, she desired the sale to be confirmed, otherwise that the proceeds be returned and a resale ordered.

The appellant filed what is termed a supplemental bill to settle partnership, alleging the foregoing facts in substance and stating that when she made her bid she believed she

was buying all the abstract books and abstract property belonging to said firm; that the "Patent Numerical Tract Index" was the most valuable book in the entire set of abstract books, and was in fact embraced under the description in the decree and notice of sale of "Abstract Index;" that Worman also retained a miscellaneous reference book to sales, power of attorney, etc., and also said pencil memoranda. The prayer of the bill was that the court would hear evidence and determine whether said books and memoranda were firm property, and if so, order same delivered to her, otherwise, that she be relieved of her bid and a resale ordered. Evidence was taken, and on hearing the court found and decreed that said property above named in controversy was the individual property of A. J. Worman, the defendant, and that the sale of December 1, 1893, was in all respects made and conducted according to law, and the sale then made was confirmed, from which decree this appeal was taken.

It is apparent that the questions raised by this alleged supplemental bill relate wholly to questions of fact, viz., whether said property in dispute was firm or individual property. The appellant made the bid at the sale in her individual capacity, and this bill was filed to enforce the alleged personal rights thus acquired. Hence, the point made that defendant could not testify to certain matters objected to is not considered well taken. The court, however, admitted such evidence under objection, but there was other concededly competent evidence to show that the deceased member of the firm had admitted, during his lifetime, that said "Patent Numerical Tract Index" belonged to defendant. The written bill of sale shows that it represented a patent system, or at least pretended to, under the name of "Wilson & Siddall's System of Tract Index," which, on September 21, 1881, before the partnership was formed, was "sold to A. J. Worman, with exclusive right to use Wilson & Siddall's system of tract index, to deed, decree and judgment records in county of Effingham, Illinois, only," in consideration of \$150. This book was not sold to the firm, and



Story & Clark Organ Co. v. Rendleman.

was not included in the decree or notice of sale, as the evidence clearly shows.

None of the property in dispute was present at the sale, or offered for sale. The books sold were present and exhibited, and in a sense explained. The appellant was present and represented by her attorneys. They could readily see what was offered for sale. There is no evidence tending to show there was any deception practiced so as to mislead appellant, or her counsel. The evidence, in our judgment, sustains the findings of the court, and the decree is affirmed.

Story & Clark Organ Co. v. L. Rendleman et al.

1. APPELLATE COURT PRACTICE—*No Exceptions in the Court Below.*—The sufficiency of the evidence to support a verdict can not be questioned when no exception to the action of the court below, in overruling a motion for a new trial, has been preserved in the bill of exceptions.

2. SAME—*Sufficiency of Pleas.*—When a party, instead of abiding by his demurrer, replies to a plea, goes to trial on the issue thus joined and does not raise the question of the sufficiency of the plea thereafter by duly preserved exceptions to the action of the court in overruling a motion in arrest of judgment (where the question can be raised in this manner after judgment on demurrer) he can not raise the question of such sufficiency in the Appellate Court.

3. PRACTICE—*Motion in Arrest After Judgment on Demurrer.*—After a judgment on demurrer there can be no motion in arrest for any exceptions which might have been taken on the demurrer.

4. SAME—*Plea of Recoupment—General Issue.*—It is not error to sustain a demurrer to a plea of recoupment where this defense can be made under the general issue which is pleaded.

**Assumpsit**, on a promissory note. Appeal from the County Court of Union County; the Hon. MONROE C. CRAWFORD, Judge, presiding. Heard in this court at the August term, 1895. Affirmed. Opinion filed March 7, 1896.

HILEMAN & SESSIONS, attorneys for appellant.

KARRAKER & LINGLE, attorneys for appellees.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

The sufficiency of the evidence to support the verdict can not be questioned in this court, for the reason that no exception to the action of the court below in overruling the motion for a new trial has been preserved by bill of exceptions.

The sufficiency of the second plea of Frank and Henry Rendleman can not be questioned, for the reason that appellant, instead of abiding its demurrer when the same was overruled, replied to the plea and went to trial upon the issues thus joined, and did not raise the question of the sufficiency of the plea thereafter by duly preserved exceptions to the action of the court in overruling the motion in arrest of the judgment, even if the question could have been raised in this manner after judgment on demurrer. It has been held in this court that, after a judgment on demurrer, there can be no motion in arrest for any exception which might have been taken on the demurrer. See *Mayer v. Lawrence*, 58 Ill. App. 194, and authorities therein cited.

The objection to the instructions for appellees, that they are framed upon the theory of the sufficiency of the second plea, will not be considered, for the reason that the instructions given for appellant are based upon the same theory.

There was no substantial error in the rulings of the court in admitting evidence or in refusing to give instructions.

The court did not err in sustaining a demurrer to the plea of recoupment, and especially so when it is remembered that recoupment may be proven and availed of under the general issue.

The judgment is affirmed.

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**Joel P. Watson v. B. N. Henniger.**

1. VERDICTS—*Upon Conflicting Evidence.*—Questions upon which the evidence is conflicting are questions to be settled by the verdict of the jury.

2. APPELLATE COURT PRACTICE—*Absence of Exceptions.*—The ruling

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Watson v. Henniger.

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of the court below upon the admission of testimony can not be reviewed where no exceptions appear in the bill of exceptions.

**Transcript from a Justice of the Peace.**—Appeal from the Circuit Court of Perry County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding. Heard in this court at the August term, 1895. Affirmed. Opinion filed March 7, 1896.

ALBERT WATSON, attorney for appellant; S. S. JONES, of counsel.

BENJAMIN W. POPE, attorney for appellee.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

Appellant and appellee entered into an agreement for the sale, by the former to the latter, of his right to the possession of part of a certain building in Ashley, occupied by appellant under a parol agreement with the owner. Appellant agreed to see the owner and procure a lease directly from him to appellee, who was to pay the rent to the owner and to pay appellant \$150 besides, for his right of occupancy. The preponderance of the evidence shows that when the trade was first under consideration, appellant stated that he was entitled to the possession of the premises for twenty-seven months. It appears, however, that the lease tendered appellee was for twenty-four months only. Whether appellee agreed to take a lease for twenty-four months, or declined to do so, and refused to complete the contract on the ground that the lease should have been for twenty-seven months, was a question upon which the evidence was conflicting, and therefore a question to be settled by the verdict of the jury. We can not say that the jury have transcended their power under the law in returning a verdict for appellee.

The only other point made by appellant relates to the refusal of the court to permit a certain question to be answered on cross-examination. This ruling is not before us for review, because no exception to the same appears in the bill of exceptions.

The judgment is affirmed.

**Robert Dempster v. Matilda Stephen and Frederick Stephen, her husband.**

1. **MARRIED WOMEN—*Right to Recover Rents for Lands in Canada.***—A married woman can not recover, in the courts of this State, rents for real property in Canada, without showing that she has a legal right to such rents by the laws of that province.

2. **SAME—*Right to Rents at Common Law.***—At common law the husband alone had the right to sue for and recover the rents of the lands of his wife.

3. **COMMON LAW—*Presumption as to Where it Prevails.***—In the absence of all proof to the contrary, the common law is presumed to prevail in the province of Canada.

4. **JUDICIAL NOTICE—*Of the Laws of Another Country.***—Courts will not take judicial notice of the statutes and local usages of another country.

**Action for Rent.**—Error to the County Court of Madison County, Ill.; the Hon. WILLIAM P. EARLY, Judge, presiding. Heard in this court at the August term, 1895. Reversed and remanded. Opinion filed March 7, 1896.

WISE & McNULTY, attorneys for plaintiff in error.

On the commonlaw questions the courts of this State will presume the common law to be in force in sister States, or in foreign States where the system of jurisprudence is derived from the same source as our own. *Crouch v. Hall*, 15 Ill. 263; *Tinkler v. Cox*, 68 Ill. 119; 19 Am. & Eng. Ency. of Law, p. 46, par. 10, title "Presumptions;" *Meyer v. McCabe*, 73 Mo. 236; *Cressy v. Tatom*, 9 Or. 541; *Seyfort v. Edison*, 45 N. J. L. 393; *Bradley v. Hardin*, 73 Ala. 70; *Connor v. Trawrick*, 37 Ala. 289; *Rodgers v. Cook*, 86 Ind. 237; *Carpenter v. Grand Trunk R. R.*, 72 Me. 388; *Ellis v. Maxson*, 19 Mich. 186; *Robards v. Marley*, 80 Ind. 185.

The common law being presumed to be in force in Canada the wife can not maintain this suit. 2 Kent's Commentaries, star page 130.

BURROUGHS & BRO., attorneys for defendants in error.

In the absence of proof showing that by the laws of

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Dempster v. Stephen.

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Canada the wife would be entitled to the rents and profits of her land, the common law will prevail and the rents and profits will go to the husband; hence the amendment by joining the husband was correctly made. *Tinkler v. Cox*, 68 Ill. 119.

The courts of this State will not take judicial notice of the statutes of other States, changing the common law, and in absence of proof to the contrary, will presume that the common law is in force in such State. *Tinkler v. Cox*, 68 Ill. 119; *Crouch v. Hall*, 15 Ill. 263.

MR. PRESIDING JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

This suit was brought by Matilda Stephen against plaintiff in error, to recover rent for real property in Canada, owned by her in fee. She was then married to Frederick Stephen, and was his wife when she brought the suit and when the cause was tried. By agreement the cause was tried by the court, who found for the plaintiff, and the defendant entered his motion for a new trial, which the court overruled, and entered judgment for plaintiff upon the finding for \$476.12 damages, and for her costs of suit. Thereupon defendant took this appeal.

The record shows that after the court had heard the evidence, and taken the cause under advisement, the plaintiff was permitted, on her motion, to amend the declaration by joining Frederick Stephen, husband of plaintiff, as plaintiff, and without imposing any terms, as asked for by defendant. This action of the court, and several other errors, are assigned as reasons for reversal. The vital objection to the judgment is, that under the evidence, the plaintiff, Mrs. Matilda Stephen, could not legally recover for the cause of action set up in the declaration, and for which judgment in her favor was entered.

The rent sued for was due for property in Canada, and no law of that province having been introduced in evidence to show that she had the legal right to collect the rent, at common law the husband alone had the right to sue for and

recover it. In the absence of all proof to the contrary, the common law is presumed to prevail in the Province of Canada, and courts will not take judicial notice of the laws of another country as to the statute and local usages of such country. *Crouch v. Hall*, 15 Ill. 264. If the wife at the time of the marriage be seized of an estate of inheritance in land, the husband, upon the marriage, becomes seized of the freehold, and he takes the rents and profits during their joint lives. During the continuance of the life estate of the husband, he sues in his own name for an injury to the profits of the land. 2 Kent's Com., 131; *Clapp v. Houghton*, 10 Pick. 463; *Hanchett v. Rice*, 22 Ill. App. 446.

The same principle, in respect of the common law as applied to personal property, is held in *Tinkler v. Cox*, 68 Ill. 119, a case where a married woman owned a horse in Indiana and moved into this State with her husband, bringing the horse with them, and he afterward mortgaged the horse and placed it in possession of the mortgagee. She brought replevin and the court held that she could not recover, saying: "The point is, she purchased the horse in Indiana, but it is not proved by the laws of that State, property so purchased became the separate property of the wife, free from the control of the husband. In the absence of such proof, we must presume the common law was in force at the time the wife bought the horse, and so presuming, by that law the title of the property became vested absolutely in the husband. Being so vested in him, by no act of our legislature could his title be divested."

The holding by the court on behalf of plaintiff, Mrs. Stephen, as to the effect of the written promise by defendant to pay her the rent, within the period of five years before suit was brought, might have been proper, if under the law and evidence she had the right to collect the rent; otherwise it was error to so hold.

In our opinion, there being no proof of the laws of Canada, the place where the contract for renting was made, whereby the wife was given the right to collect for herself, rent of her separate estate, the common law must be held

to have prevailed there at and during the time said rent accrued, and the husband alone could sue for and collect the same. Hence the finding and judgment for Mrs. Stephen, under the proof, was error. So holding, it is superfluous to lengthen this opinion by commenting upon other errors assigned.

The judgment is reversed and cause remanded.

### Harriet C. North v. Thomas E. North.

83	129
166s	179

1. *CONSIDERATION—Money Paid by a Husband for His Wife.*—Where a husband pays money on a contract of his wife for her benefit, but without her request, such payment will form a sufficient consideration to support a subsequent promise on her part to repay the same.

2. *MONEY PAID FOR THE USE OF ANOTHER—When the Action can be Maintained.*—In order to maintain an action for money paid for the use of another, it must appear that it was paid at such other's request, expressed or implied, or that after such payment there was an express promise to pay it back. If there is a request, expressed or implied, from that the law implies the requisite promise; and if there is a subsequent express promise to repay it, from that the law implies the requisite previous request.

*Assumpsit*, on a promissory note and for money paid, etc. Appeal from the Circuit Court of Jackson County; the Hon. JOSEPH P. ROBARTS, Judge, presiding. Heard in this court at the August term, 1895. Affirmed. Opinion filed March 7, 1896.

F. M. YOUNGBLOOD and ISAAC CLEMENTS, attorneys for appellant.

HILL & MARTIN, attorneys for appellee.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The appellee recovered a judgment against appellant, his wife, on a note for the sum of \$1,200, from which this appeal was taken. The substantial facts are that many years ago appellee placed the title to the homestead in his

wife's name. The buildings thereon were insured in her name, as was also the furniture therein. In the year 1892, the house and furniture were destroyed by fire and the sum of \$2,412 of insurance was collected by appellant for the loss. In 1893, the appellant, who at times kept boarders and made considerable money, contracted in her own name for the erection of a new house, to cost \$4,068; some extras ran the total cost up to over \$4,200, including furnace, mantel, etc. On November 18, 1893, the house was completed and settlement had, showing a balance due to contractor of \$1,218.53.

This settlement was made by the appellee with the contractor, at a lawyer's office, in the absence of appellant, after which, about eleven o'clock at night, they went to the house or home of appellant to close up the matter, which was done by appellee and appellant there jointly signing a note payable to the contractor for \$718.53 and by appellant paying the contractor in cash \$200, and giving him her check on the bank for \$300. At the same time the appellee claims the note in suit, payable to him, was also signed, for \$1,200. The pleas interposed the defenses of *non est factum*, fraud and circumvention, and failure of consideration.

The finding of the issues against appellant is claimed to be contrary to the evidence, and that certain instructions given to the jury were erroneous.

It would serve no useful end to here analyze the evidence. It has been carefully examined and the conclusion reached is that appellant signed the note. This is clear, but it is more difficult to determine whether she did so knowingly. There is no evidence that he resorted to any deception that would amount to fraud and circumvention. This was a question of fact that was fairly submitted to the jury, under instructions, of which, as to that issue, no complaint is made. The main point relied on by appellant is that there was no consideration for the note. He testified in effect that he paid for her benefit \$2,708.12, and brought suit to recover that amount, but a recovery was obtained only on the note. He gives the items for which the money was paid. If the jury believed him, as they must have done by their



verdict, he paid out a large sum of money toward completing the house and for improvements, the title of which was in her, and the contract for the construction of which house was made with her in writing, individually, besides various sums for other purposes. His evidence is not substantially contradicted as to the amount paid. Whether it was paid by request or on a promise to repay was a question of fact for the court and jury. If the jury was properly instructed, the evidence is such that we would not be disposed to disturb the finding. Complaint is made of the instructions on this point. The court instructed the jury "that primarily it is the duty of the husband to provide the homestead for the family, and the mere fact that the same is built upon the land that the husband has given to the wife will not entitle the husband to sue and recover from the wife the amount of money or material, if any, which he has contributed toward the building of the homestead, *unless it appears from the weight of the evidence that such money or material was so furnished at the request of the wife, with the understanding, or an agreement since, that the wife shall pay the husband for the same.*"

This instruction, offered by appellant, was modified by the court by the addition of the words in italics, and so given. The point of the objection is that this, and other similar instructions, authorized a recovery on a subsequent promise to pay, though originally the husband paid the money without request. Instructions must not be looked at so theoretically and abstractly as to exclude the matter of fact to which they were intended to be applied. They were intended to be applied to the building of a dwelling house on the homestead, which had been contracted for, as conceded, by the wife in her own name, showing not only that she was legally bound to pay the contract price herself, but evincing clearly her intention to do so, without relying upon the marital obligations of the husband. In this light this instruction, as well as numbers four and eight, likewise modified by the court, must be viewed. Therefore if the husband paid money on such a contract for her benefit, though without her request, such payment would form a

sufficient consideration to support a subsequent promise on her part to repay.

"The rule may be stated to be that, in all instances, in order to maintain an action for money paid for the use of another, it must appear that it was paid at his request, express or implied; or that, after such payment, there was an express promise to pay it back. If there is a request, express or implied, from that the law implies the requisite promise, and if there was a subsequent express promise to repay it, from that the law implies the requisite previous request." Wait's Action and Defenses, Vol. 4, p. 453.

"If another comes in, without request or necessity, and pays the debt, the debtor is not obliged to substitute him in the place of the original creditor unless he chooses to do it. But he may do this if he so wishes; and if, after the debt is paid by this third party, the debtor choose to promise him repayment, he is held to such promise, and the consideration, although executed, is sufficient, for the law implies a previous request." 1 Parson on Contracts, p. 472; Doty v. Wilson, 14 Johns. 378.

If appellant knowingly executed the note sued on, it was of itself a promise to pay. The court and jury below evidently considered that she did knowingly make such promise by knowingly giving said note. While the evidence on this point is not entirely satisfactory, yet there is evidence to sustain the finding. The court and jury had the better opportunity to test the issue thus presented and arrive at a proper conclusion. The judgment is affirmed.

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63	132
73	680

**F. D. Clark and W. C. Bosquit, Partners, etc., v. Edward Lauman.**

1. PARTNERS—*Agreements Between, Binding upon Third Persons with Notice.*—As between partners, they may agree that one only shall have the authority to settle and discharge debts, and a debtor of the firm, with notice of such an agreement, will be bound by it.

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Clark v. Lauman.

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2. SETTLEMENT—*When Fraudulent, not Binding.*—A settlement by a debtor of a partnership made with one partner in fraud of the rights of the others can not be sustained.

**Assumpsit**, for balance due on a contract. Error to the City Court of East St. Louis; the Hon. B. H. CANBY, Judge, presiding. Heard in this court at the August term, 1895. Reversed and remanded. Opinion filed March 7, 1896.

WISE & McNULTY, and WM. P. LAUNTZ, attorneys for plaintiffs in error.

In cases of fraud or collusion, the court will protect the other partners by refusing to allow a release made by one partner under such circumstances to operate as a defense. Such a release is void. *Bosquit & Clark v. Lauman*, 52 Ill. App. 637; 1 *Lindley on Part.* (2 Am. Ed.), Marg. pp. 135, 145, 146; *South Fork Canal Co. v. Gordon*, 6 Wall. 561; *Beatson & Messer v. Harris*, 60 N. H. 83; *Gram & Stewart v. Caldwell*, 5 Cow. 489; *Baker & Owen v. Richardson*, 1 Young & Jervis, 364; *Braley v. Goff & Orr*, 40 Iowa, 76; *Henderson & Smith v. Wild*, 2 Campb. 561.

L. H. HITE, attorney for defendant in error.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The plaintiff in error sued defendant in error to recover an alleged balance of \$769.99 for building a house. The latter pleaded the general issue and set-off. Afterward the general issue was withdrawn and a plea filed setting up a written agreement of settlement of the cause of action for \$75 with Clark, but made in the name of the firm. To this plea a replication was filed setting up that the alleged settlement was made in knowing fraud of Bosquit's rights; that defendant knew the plaintiffs were not general partners, but only for the construction of that building; that the work was all done and defendant was notified that Clark had no interest in the contract, and that William P. Launtz was to collect the money due and was authorized to settle for same, etc.

Trial was had on this issue and judgment was rendered for the defendant.

The evidence shows that there was a balance of \$769.99 due the plaintiff. The defendant did not choose to offer proof under his plea of set-off, but relied upon the agreement of settlement made with Clark.

The alleged settlement was made on the 7th day of November, 1892.

Prior to that time, on the 2d day of November, 1891, the defendant had been served with a copy of the following agreement made between Clark & Bosquit:

"We, the undersigned, hereby agree that no settlement of the balance (contract price) for building the Lauman house \* \* \* now due us, shall be settled by or through any other person than Wm. P. Launtz, who alone is hereby authorized to settle the same for us, and we request and notify said Lauman to settle the same with no other person, only in the event of said Launtz' absence from the city, when George L. Corliss, Esq., attorney for said Launtz, is hereby authorized to settle same. Witness our hand and seals this 2d day of November, 1891.

F. D. CLARK,  
W. C. BOSQUIT."

The evidence further shows that Bosquit was the principal man of the firm, managed its affairs, and that Clark was a journeyman carpenter, who, as soon as the written agreement was made, settling said cause, left for parts unknown. He was a man who indulged in drink at times to excess, and was engaged with Bosquit in this contract only. He sought out the attorneys for defendant to obtain the settlement and the \$75, and although Bosquit and Launtz were in the same city, the settlement was made without consulting them or either of them, although it was well known they insisted there was \$769.99 due.

Leaving out of consideration all other evidence, the written agreement between Bosquit and Clark, above set out, a copy of which was served on the defendant, precluded him from settling with Clark alone.

The instrument was more than one evidencing the appointment of an agent to collect. It was an agreement as between the parties themselves, in effect that neither should collect the money or settle the matter. It was full notice to defendant that neither separately had the authority to do so. Want of authority, of course, destroyed the validity of the release. The agreement was of such a character that neither party to it could withdraw from and nullify it without the consent of the other, which expressly stated that "we request and notify said Lauman to settle the same with no other person" than said Launtz. The effect of this instrument seems to have been misconceived, for looking at it as a contract between the parties themselves, which on its face it purports to be, it is clear that it could not be revoked by either at his pleasure.

It has been repeatedly held, that as between the partners, they may agree that one only shall have the authority to settle and discharge debts, and a debtor of the firm, with notice of such agreement, would be bound by it. *Gram v. Caldwell*, 5 Cowen 489; *Lunt v. Stevens*, 24 Me. 534. And in *Beaston and Messer v. Harris*, 60 N. H. 83, it is held a fraudulent settlement with notice of the rights of the other parties, will not be sustained. We hold the settlement made in this case, with notice of the agreement, was a fraud on Bosquit and not binding on the firm. The judgment is reversed and the cause remanded.

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Goebel & Wetterau v. Montgomery & Co. et al.

1. PRACTICE—*Trial by the Court—No Propositions of Law Submitted.*—When the trial is by the court and no propositions of law are submitted, the only question before the Appellate Court is whether or not the evidence is sufficient to sustain the finding and judgment of the court below.

2. SAME—*Failure to File a Plea Denying the Partnership.*—The failure by a defendant to file a plea denying the partnership alleged in the declaration, does not conclusively make such defendant a member of the firm.

**Attachment and Interpleader.**—Appeal from the Circuit Court of Randolph County; the Hon. GEORGE W. WALL, Judge, presiding. Heard in this court at the August term, 1895. Affirmed. Opinion filed March 7, 1896.

A. E. CRISLER and A. G. GORDON, attorneys for appellants.

RALPH E. SPRIGG, attorney for appellees.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

This case was tried by the court without a jury. No propositions of law were presented to the court by either party. Therefore the only question before us, and in fact, the only question argued by counsel, is whether or not the evidence is sufficient to sustain the findings and judgment of the court.

The case was commenced by a writ of attachment sued out by appellants against Montgomery & Co., who were indebted to appellants for merchandise sold and delivered. Three grounds of attachment were stated in the affidavit. One ground only was insisted upon, however, and that was that Montgomery & Co. were about to fraudulently dispose of their property so as to hinder and delay creditors.

The Hargadine-McKittrick Dry Goods Co. filed an interpleader, in which they claimed to be the owners of the property as preferred creditors by reason of a *bona fide* purchase of the goods from Montgomery & Co. in payment of the amount due them for goods sold and delivered. There was no question as to the justness or amount of the interpleader's account. The controversy was as to the good faith of the sale, and also as to the transfer of the possession of the property before the writ of attachment was levied. The evidence, as is usual in this class of cases, was conflicting. But the court was justified in finding that the interpleader was the owner of the property as a purchaser in good faith, to satisfy an indebtedness justly due, and was in the possession of the property before the levy of the attachment writ.

## City of Pinckneyville v. Hutchings.

The court was also justified in finding for Montgomery & Co. on the issues joined on the attachment affidavit.

It is said, however, that the sale was made by Isaac Montgomery, and that this did not pass John Montgomery's interest in the property as a member of the firm of Montgomery & Co. But the evidence shows that John Montgomery was not a member of the firm. Isaac Montgomery was doing business under the firm name of Montgomery & Co., and John, his son, was acting as the manager of the business. Nor is there sufficient evidence to show that John so conducted the business as to make himself responsible to third parties as a partner.

But it is urged that "failing to deny the partnership by plea makes it conclusive that John Montgomery was a member of the firm." Such is not the law. 2 Starr & Curtis' Stat., Chap. 110, Sec. 36; Martin et al. v. Nelson et al., 53 Ill. App. 517.

It is worthy of remark that no objection to the evidence on this question was made when the same was introduced, and that for this reason no objection will be entertained now; also that the name of John Montgomery does not appear in the affidavit or writ, or in any pleading in this case, but is found in the sheriff's return only, and that if John was not a member of the firm of Montgomery & Co. no plea of any kind upon his part was necessary. The judgment is affirmed.

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City of Pinckneyville v. Riley Hutchings.

63	137
63	140

1. **DAMAGES—Lands Taken for Water Works—Recovery a Bar.**—The owner of lands taken by a city for the construction of a dam, designed as a part of a permanent system of water works, is entitled to recover in one suit all his damages up to the fair market value of the land, present and prospective, necessarily resulting from its use, and such recovery will bar all future actions for the same cause.

**Trespass on the Case.**—Damages for lands taken, etc. Appeal from the Circuit Court of Perry County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding. Heard in this court at the August term, 1895. Affirmed. Opinion filed March 7, 1896.

C. R. HAWKINS and J. K. P. RAGLAND, attorneys for appellant.

I. R. SPILMAN, attorney for appellee.

MR. PRESIDING JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

This action in case was brought by appellee to recover from appellant damages to his land, caused by a dam built at a point below said land, across a creek flowing through it, causing water to flow onto his land and stand thereon, and lessen it in value, and destroying and preventing the use of a quarry thereon, which dam and obstruction, it is averred, appellant kept and continued, and now designs to continue, as a part of the system of water works for the use of said city of Pinckneyville and its inhabitants.

Appellant filed its plea of not guilty. The cause was tried, the jury found for the plaintiff and assessed his damages at \$137.50. Appellant's motion for a new trial was overruled, and judgment was entered for the damages assessed and costs. To reverse the judgment this appeal was taken.

It is claimed by appellant that only damages for the past injuries to the land and use thereof could be recovered, and that the trial court erred in instructing the jury that the dam in question is to be regarded as a permanent structure, and therefore all damages to the fair market value of plaintiff's land, if any, must be determined in this suit, and this suit will be a bar to all other suits for damages from the cause complained of in this suit.

The cause complained of was the building of a permanent dam by the defendant, which it has kept up and continued to the time of commencing the suit, and designs to continue as a part of the system of public water works for said city.

The city was empowered by "Pars. 175, 176, Chap. 24, S. & C. Rev. Stat.," to acquire and hold the necessary land, and establish and maintain water works thereon, and construct thereon a suitable and sufficient dam to collect and hold water for the use of the city and its inhabitants, sub-



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City of Pinckneyville v. Rhine.

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ject to the provisions of "Article 2, Sec. 13, Const. of 1870," which provides that private property shall not be taken or damaged for public use, without just compensation.

This dam, then, having been properly constructed, and by lawful authority, and to be maintained permanently for a proper public use, appellee was entitled to recover in this one suit, all the damages, to a fair market value, of his land, present and prospective, necessarily resulting from its construction, and one recovery will bar all future actions for the same cause. Hence the construction complained of was not erroneous.

The same question was presented to this court in the case of *City of Centralia v. Wright*, 58 Ill. App. 51, and we there held, as we do in this case, under like facts substantially, that the plaintiff had the right to recover damages, present and prospective, arising from the construction of a dam by the city, as a part of the system of public water works.

At the instance of the city, we granted an appeal from our judgment in that case to the Supreme Court, and it decided the rule adopted by, and decision of this court, was right, and affirmed our judgment. *City of Centralia v. Wright*, 156 Ill. 561.

We will not lengthen this opinion by citing authorities fortifying it. They will be found in the opinions in 58 Ill. App., and 156 Ill. 561. We think the judgment is right, and the same is affirmed.

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City of Pinckneyville v. C. R. and Theodore Rhine.

1. **DAMAGES—Resulting from the Construction of Public Works.**—All damages resulting from the construction of public works, of a permanent character, present and prospective, must be recovered in one action.

**Trespass on the Case, for lands taken for public use, etc.** Appeal from the Circuit Court of Perry County; the Hon. BENJAMIN R. BURGESS, Judge, presiding. Heard in this court at the August term, 1895. Affirmed. Opinion filed March 7, 1896.

C. R. HAWKINS and J. K. P. RAGLAND, attorneys for appellant.

B. W. POPE and I. R. SPILMAN, attorneys for appellees.

MR. PRESIDING JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

This action was brought to recover damages caused by the construction and maintenance of the same dam as was complained of in *City of Pinckneyville v. Hutchings*, in which an opinion is filed at this term. The damages recovered in the case at bar were assessed by the jury at \$200, for which sum and costs judgment was entered, and the city took this appeal. The same question is presented in this case as in the case above mentioned, and the same instruction is complained of. The plaintiff below had the right to recover all damages in this action to the fair market value of his land, present and prospective, necessarily resulting from the construction of said dam, and was not restricted to the recovery of those damages only which had already resulted up to the time suit was commenced.

We have said this in the opinion filed in the case mentioned, and held the instruction was not erroneous. It is not necessary to again discuss the question presented, as we have already done so in the opinion referred to. The judgment is affirmed.

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**Caleb M. Miller v. Perks & Higgins, and James M. Coffman.**

1. EQUITY PRACTICE—*Abandonment of Pleas*.—A plea to a bill in chancery is abandoned by the filing of an answer and a hearing by consent of all parties.

**Mechanic's Lien**.—Appeal from the Circuit Court of Union County; the Hon. JOSEPH P. ROBARTS, Judge, presiding. Heard in this court at the August term, 1895. Affirmed. Opinion filed March 7, 1896.

Miller v. Perks & Higgins.

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DODD & PICKRELL, attorneys for appellant.

KARRAKER & LINGLE, attorneys for appellees.

MR. PRESIDING JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

A bill was filed in this cause by Perks & Higgins, appellees, against appellant and one Ben. F. Warner, for a lien as material-men for material furnished Warner and used by him in the construction of a building for Miller, on a lot he owned in Anna, Illinois. The bill was afterward amended by making other persons additional defendants, among whom James M. Coffman was one, and he having answered the amended bill, filed his cross-bill for a lien on the same lot for a claim due him for labor as a brick mason upon the same house, as a sub-contractor under Warner. The cause was submitted and heard by the court upon the amended bill of Perks & Higgins, the answer of Warner, Miller and Coffman thereto, and replications to such answers, and the cross-bill of Coffman, the answers of Perks & Higgins, Warner and Miller thereto, and the replication to said answers; the evidence taken and reported by the master, under the order of the court, and the arguments of counsel for all of said parties.

The court being thus fully advised, found it had jurisdiction of the parties and of the subject-matter, and that the matters alleged in the petitioner's petition are true as therein stated; that petitioners, Perks & Higgins, were dealers in lath, shingles, cement and other building materials, at Mound City, Illinois; that on August 20, 1892, defendant, Miller, entered into a written contract with Warner to build for him a two-story opera house building, with basement, on his lot in Anna, Illinois (describing the same), for and in consideration of which Miller was to pay Warner \$11,016 and for extras put in such building; that at the time of making such contract Miller was, and still is, the owner in fee of said premises; that after the making of such contract, Warner procured material and commenced the erec-

tion of said building, and continued to do and perform labor thereon until the work was taken out of his hands by said Miller, and that said Warner did not abandon his contract; that Perks & Higgins furnished Warner fifty barrels of Portland cement, at the contract price of \$2.50 per barrel, and 200 sacks containing such cement, at ten cents per sack, from which a deduction is made of \$21 for freight; and that there is now due said petitioners \$144; that said material was shipped to Anna, Illinois, on July 17, 1893, was received by Warner and used in the construction of said opera building so built upon the premises aforementioned; that said Warner and Miller having, upon application of petitioners, refused to pay said sum of \$144, said petitioners, on September 20, 1893, served notice on Miller that they had furnished said cement and sacks to Warner, so used in the construction of said building; that \$144 was due them therefor, and that they would hold said building and ground upon which it is situated, liable for the sum due petitioners; that afterward, on September 26, 1893, petitioners filed with the Circuit Court of said county their claim for lien, as provided by statute, accompanied by the affidavit of petitioner Perks, as required by law. And the court doth further find that there was due and afterward became due to Warner, upon his said contract and for extras, a sum equal to amount due petitioners, and that said Miller paid the same out after the said notice and in violation of the rights of said petitioners. The court further found the allegations in the cross-bill of Coffman were true; that Coffman contracted with Warner to do the brick work on the walls of said opera house, and in pursuance of said contract had and did perform labor to the amount of \$1,223.67, of which there remains due and unpaid to said Coffman \$196.57; that on June 3, 1893, said Coffman notified Miller in writing he had been employed by Warner to perform said labor; that he had performed the same; that there was yet due and unpaid of the contract price the sum of \$196.57, and that said Coffman would hold the interest of Miller in said building, and ground on which it was located, liable for the payment of

said sum; that said contract for the performance of said labor was entered into September 1, 1892, and the last day's work was done by Coffman on said building under said contract on May 20, 1893; that on June 27, 1893, Coffman filed with the clerk of the Circuit Court of said county his claim under oath for lien upon said premises for said sum, as required by law; that on May 20, 1893, the proportionate value of the contract then completed by Warner upon the original contract with Miller was equal to and of the value of \$5,000, and that Miller, after the service of said notice, has paid out to said Warner and on his order, in violation of the rights of Coffman, the sum of two thousand dollars.

Upon these findings the court decreed that Perks & Higgins have and recover from Warner and Miller \$144 and costs incurred by them, and that they have a lien therefor on said described premises, and the same be paid said petitioners, with interest from date of decree, within thirty days; and that Coffman have and recover from Warner and Miller \$196.57, with his costs, and have a lien on said described premises for the amount so found to be due from Warner and Miller, and that the same be paid, with interest from date of decree, within thirty days. . It is further decreed in case Warner and Miller shall make default in the payment of said sums of money within the time limited, the master shall make sale of said premises, or such part thereof as may be necessary to pay the amounts aforesaid, at public auction, to the highest and best bidder for cash, after having first given public notice of the time, place and terms of said sale, by publication in some newspaper published in said county, for the space of four weeks, and by posting like notices in four public places in said county for a like period of time; that upon the making of such sale the master will issue a certificate of purchase to the purchaser as provided by law, and out of the proceeds pay the costs, including his commissions and expenses of sale; secondly, pay to Perks & Higgins said sum of \$144, and to Coffman \$196.57, and interest due on each of said sums, and the surplus, if any, to Miller, and the master will report his doings to the court.

If the findings of the court as set out in this decree are warranted by the evidence, there can be no doubt that Perks & Higgins and Coffman were entitled to the relief prayed for and decreed to them. An examination of the record satisfies us that each of the findings is supported by sufficient evidence, and the provisions of the statute necessary to be complied with to entitle said Perks & Higgins and Coffman to a lien upon said premises for the amounts found due them, were fully complied with.

Our attention has been invited to a plea interposed by Miller to Coffman's cross-bill, but the hearing was by consent of all the parties upon the amended petition of Perks & Higgins, the answers thereto and replication to such answers, and the cross-bill of Coffman, the answer of appellant and others thereto and replication to such answer, and upon the issue so made the cause was heard and decided. The plea was abandoned as setting up a defense and can not now be considered by us.

In our opinion the decree is right and is affirmed.

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**Louisville & Nashville Railroad Company v. Anna M. Pirschbacher.**

1. **ADMISSIONS**—*In Instructions*.—Where, in an action against a railroad company for killing domestic animals, the defendant in the instructions given in its behalf used the term "plaintiff's team," it was held to be an admission that the team was the property of the plaintiff, sufficient to sustain the verdict on the question of proof of ownership.

2. **SPECIAL INTERROGATORIES**—*When Not Error to Refuse*.—It is not error to refuse a special interrogatory, the answer to which would be merely evidential and not of ultimate facts.

3. **VERDICT**—*Must be Supported by the Evidence*.—Where the evidence in an action against a railroad company, for killing horses, shows that such killing was not the result of the causes set forth in the declaration, the recovery can not be sustained.

4. **RAILROADS**—*Duty at Highway Crossings*.—A railroad company is not required, in approaching highway crossings outside of cities and villages, to slacken the speed of its trains below their usual speed.

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L. & N. R. R. Co. v. Pirschbacher.

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**Trespass on the Case, for killing domestic animals.** Appeal from the Circuit Court of St. Clair County; the Hon. ALONZO S. WILDERMAN, Judge, presiding. Heard in this court at the August term, 1895. Reversed and remanded. Opinion filed March 7, 1896.

J. M. HAMILL, attorney for appellant.

WILLIAM WINKELMAN, attorney for appellee.

MR. PRESIDING JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

Appellee brought this suit to recover damages for the value of her two horses alleged to have been killed, and her wagon alleged to have been demolished and destroyed by the negligence of appellant in failing to ring the bell or blow the whistle attached to the engine, at least eighty rods before, and continue ringing or blowing until the engine and train reached the Carlyle road crossing. And that appellant so carelessly conducted said engine and train on its approach to said crossing by not slackening, and not giving warning as aforesaid, of the approach of said engine and train to plaintiff's servant while he was driving across said crossing, that in consequence thereof her said property had been destroyed. It is insisted by and on behalf of appellant there was no proof made that the horses and wagon were the property of appellee. But witness Jacob Hart was asked, "You have heard the talk about this team of Mrs. Pirschbacher, now tell the jury what you know about them." The witness in his answer testified that he went down to place of accident the next morning after it occurred, and saw the team, and found out where it belonged and appraised it. Felix Schwartz also testified he was next neighbor to Mrs. Pirschbacher and knew the team. In addition to this evidence, the defendant in several of the instructions given on its behalf, used the term "plaintiff's team," and thus admitted the fact that the team was her property.

The special interrogatories which defendant asked the court to require the jury to return with answers thereto,

were interrogatories the answers to which would be mere evidential and not ultimate facts, and it was not error to refuse to give the same to the jury. But we are not satisfied the evidence sustained the averments that defendant failed to give the warning signals as required by the statute. And by reason of the failure to do so, the team and wagon were destroyed.

The evidence of the engineer and fireman was that the bell was rung continuously for the distance of at least eighty rods, and plaintiff's son, who was driving the team, testified it was not rung. Two other witnesses testified they did not hear the bell rung, but they were so located that they probably would not have heard the sound if the bell was ringing. But the driver of the team also testified he saw the train as it approached the crossing, a short time before the accident. And when the team and wagon were forty or fifty feet away from the crossing, that he was trying to stop the team when he first saw the train, and stopped them, and then the whistle of the engine was blown and that frightened the team and it rushed forward to the track and thus caused the collision and injury complained of.

The accident, it thus appears, was not the result of a failure to give the statutory warning signals. These are intended to inform one that a train is approaching. But the driver saw this train and thus had such information. The night was dark and the engineer, as his duty required him to do, was looking along the track in front of the train, and did not see the team until it rushed upon the track when he at once reversed the engine and applied the air brake to stop the train and avoid the accident.

It thus appears that if it be conceded the statutory signals were not given, the other material averment that such failure caused the accident, was not proven. Under a like state of fact our Supreme Court in *T. W. & W. Ry. Co. v. Jones*, 76 Ill. 312, has held no recovery could be had. But it is also averred that the defendant by its servants carelessly conducted said engine and train on its approach to said crossing, by not slackening its speed, and that caused the injury.



The crossing was a public highway, outside of a town or city, and the engineer was not required by law to slacken the speed of the engine on approaching it, below the usual speed of such trains. *T. W. & W. Ry. Co. v. Jones, supra*, and many other cases in our Supreme Court, hold such to be the law, and there were no circumstances appearing, at the time this engine was approaching the crossing, making it necessary to slacken the speed.

The sound of the whistle which frightened the team was made for a crossing, and it was done as a necessary duty, and was not a negligent act.

We find no evidence of the negligence charged, in managing or conducting said train, and no evidence justifying the verdict. Reversed and remanded.

### East St. Louis Ice and Cold Storage Co. v. Michael Sculley.

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1. **NEGLIGENCE—Selection of Appliances.**—Where there are several methods for the accomplishment of a given work and the merits and demerits of different appliances for such accomplishment may be the subject of controversy among persons supposed to be competent judges, the selection of one method can not be called negligence merely because there is a difference of opinion as to which method is safest and best.

2. **MASTER AND SERVANT—Hazards of a New Employment.**—Where the dangers of a new employment, to which an employe is temporarily called, are so open and apparent that a person in the exercise of ordinary diligence must apprehend them, such person is in law charged with having accepted the hazards of the situation.

3. **SAME—Absolute Knowledge Not Necessary.**—Where an employe is temporarily invited to assist in doing a work not in the line of his employment, and accepts the invitation without objection, absolute knowledge of the risks and dangers of such work is unnecessary. If such risks and dangers are so open and manifest that an ordinary man, under the same circumstances, would have ascertained them by the exercise of reasonable diligence, such employe occupies in law the same position as he would if originally employed to do the work.

4. **INSTRUCTIONS—Errors in, When Not Cured by Others.**—In cases

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where the evidence is evenly balanced or the right of recovery doubtful, a vicious instruction on a vital question is not cured by others which state the law correctly.

5. *SAME—Effect of Modification by the Court.*—The court may either refuse an erroneous instruction or correct it and submit it to the jury as corrected. But if the court undertakes the modification of an instruction, the instruction as modified is the court's instruction and subject to criticism as such so far as it is affected by the modification.

**Trespass on the Case, for personal injuries.** Error to City Court of East St. Louis; the Hon. B. H. CANBY, Judge, presiding. Heard in this court at the August term, 1895. Reversed and remanded. Opinion filed March 7, 1896.

CHARLES W. THOMAS, attorney for plaintiff in error.

WISE & McNULTY and L. H. HITE, attorneys for defendant in error.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was engaged in the manufacture and storage of ice. The ice was conveyed from the factory to the storage houses through a passage-way boarded up at the sides, and about seventy feet long, thirty feet high and five feet wide. In this passage-way was a platform or ice run thirty inches wide, and at the side, a plank, twelve inches wide, for the workmen to walk upon. The ice, in large blocks, was taken from the factory and marked into smaller blocks by saws, and then split or divided by the spudder, who stood upon the block, and used for that purpose a pointed instrument called a spud. The small blocks were then taken by an elevator to the platform, and caused to slide along the same to the place from which they were to be transferred to the storage houses. Sometimes the blocks became massed together, and it was necessary for some one to separate and shove them forward, which could be done by walking on the plank at the side of the platform. The platform was in sections, ten feet in length, and was supported by heavy timbers underneath, the ends of which rested in holes or niches in the sides of the passage-way.

These pieces of timber were about four by seven inches, and weighed about fifty pounds each. When the lower part of the storage house was filled, the platform was raised, one section at a time, by blocks and tackle, and the supports were also raised and placed in other niches to hold the platform in the new position. So the work was carried on until the storage houses were filled.

Sculley's injuries were received in raising the platform from the lower level, which was seven or eight feet above the bottom, to the second level, about seven feet above the lower level. Sculley had been working for plaintiff in error for several months, and was engaged in spudding at the time he was hurt. He was called from his customary work to the unusual task of assisting in raising the platform. One section of the platform had been raised to the desired elevation, and one Finmeyer was standing on a cross-piece and plank at the lower level and Sculley was standing on the same cross-piece. Finmeyer was holding the rope of the blocks and tackle, and Sculley was handing a cross-piece to one Hinze, who was on the platform and reaching down that he might receive the cross-piece and put it in place under the platform. Hinze, having taken hold of the end of the cross-piece, called upon Sculley to let go, which he did, and Hinze, not having a sure hold upon the timber, let it fall upon Sculley's head. Sculley was knocked from the cross-piece where he was standing, and fell to the bottom. When the workmen reached him he was unconscious.

The declaration contains three counts. In the first count it is charged that plaintiff in error negligently took defendant in error from his accustomed work, and put him at a task with which he was wholly unacquainted, and that the change was dangerous and the risk great; in the second count it is charged that the plaintiff in error negligently constructed the ice run without a hand rail; in the third count it is charged that the platform was negligently supported by cross-pieces, instead of being held in position by blocks and tackle.

It is difficult to see how a recovery can be sustained un-

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der thesecond or third count. If there had been a hand-rail within reach, Sculley could not have held to it while raising a piece of timber weighing fifty pounds to the platform above him. Nor would he have had time to grasp the hand-rail after delivering the cross-piece to Hinze; nor is there any reason for believing that he would have attempted to do so. The evidence, when viewed in the light of general knowledge and experience, also fails to show that the use of blocks and tackle would be so much safer or better than the use of cross-pieces as to render the use of the latter a negligent construction of the passage-way and platform. There may be several methods for the accomplishment of a given work, and the merits and demerits of the various appliances may be the subject of controversy among those who are supposed to be competent judges. In such case the selection of one method can not be called negligence merely because there is a difference of opinion among experts and also among non-experts as to what is safest and best. In this case the raising of the platform might be more easily accomplished by blocks and tackle, but the requisite of stability might be more readily secured by the use of cross-pieces. Where there is a puzzling conflict of advantages and disadvantages, the employer can not justly be required to exercise an infallible judgment in the choice of methods or means.

If the judgment in this case can be sustained at all, this must be done under the first count of the declaration. A material and sharply contested question under this count is, whether or not the dangers of the new employment to which Sculley was temporarily called were so open and manifest that one, in the exercise of ordinary diligence, must have apprehended them. Absolute knowledge of the dangers was not necessary before Sculley might be charged with having accepted the hazards of the situation; for it must be presumed that he knew what an ordinary man, under the same circumstances, would have ascertained by the exercise of ordinary or reasonable diligence.

This being the law, the court erred in modifying plaintiff

in error's second and fifth instructions. The fifth instruction, which will sufficiently illustrate the point, was modified so as to read as follows:

"The court instructs the jury that even although they may believe from the evidence that the plaintiff was not employed to do the work he was engaged in at the time of his injury, yet if the jury further believe from the evidence that he was at said work without objection, and that the risks and dangers thereof (if it had any) were open and plain to his sight, and known to him, then he occupies in this case the same position he would have occupied if he had been originally employed to do this work."

By inserting the words "and known to him" in the above instructions, the court informed the jury that Sculley was not required to exercise any degree of care whatever to ascertain the dangers of his service—that he was not responsible for what he ought to have known, but only for what may have actually come to his knowledge. Even if charged with inexcusable carelessness and inattention, Sculley could successfully answer, under this proposition of law, "I did not know that there were risks and dangers in this service, and the question as to what I ought to have known is wholly immaterial."

But counsel for defendant in error insists that the instructions should be read together and considered as one charge, and that, when this is done, the error in the second and fifth instructions is rendered harmless. It is undoubtedly the law that, in most cases, an error in one instruction may be cured by other instructions which state the law correctly, and that, if the whole charge states the law with substantial accuracy, minor imperfections may be disregarded as not having had any probable prejudicial effect.

On the other hand, there are some cases in which the evidence is so evenly balanced, or the right of recovery so doubtful, that one vicious instruction on a vital question can not be cured by many others which state the law correctly; and especially so when the bad instruction is in line with the prejudices of the jury, and may have served to di-

vert their attention from important features of the case. C. & A. R. R. Co. v. Murray, 62 Ill. 326; T. W. & W. Ry. Co. v. Larmon, 67 Id. 68; Wabash R. R. Co. v. Henks, 91 Id. 406; W., St. L. & P. Ry. Co. v. Rector, 104 Id. 296; Sinnett v. Bowman, 151 Id. 146.

But it seems to be insisted that the instructions were bad to begin with, and that for this reason, plaintiff in error can not complain of errors in modifying them.

The point may be disposed of without considering whether or not the instructions were bad in the first instance. The argument is that if one party asks the court to give an instruction which erroneously states the law in his favor, the court may erroneously turn the instruction against the party asking it, in which case one error will neutralize the other, and the two errors will thus produce good law.

The argument is fallacious. The court may either refuse an erroneous instruction, or correct it and submit it to the jury as corrected. But if the court undertakes the modification of an instruction, the instruction as modified is the court's instruction, and subject to criticism as far as it is affected by the modification. O'Neil v. Orr, 4 Scam. 1; Morgan v. Peet, 32 Ill. 281; Orr v. Jason, 1 Bradw. 439; The President, etc., v. Carter, 2 Id. 34; Holly v. Augustine, Id. 108.

Under the circumstances of this case, the error in giving the second and fifth instructions as modified is of such gravity as to require a reversal of the judgment.

The judgment is reversed and the cause remanded.

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### **Metropolitan Accident Association v. Jubal Harrison Clifton.**

1. *LIMITATIONS—In Insurance Policies—What is not a Waiver.*—A condition in a policy of insurance providing that no suit for a loss under such policy shall be maintained unless commenced within a certain time may be waived, but mere negotiations for a settlement will not have that effect.

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Metropolitan Accident Ass'n v. Clifton.

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**Assumpsit**, on an insurance policy. Appeal from the Circuit Court of Union County; the Hon. JOSEPH P. ROBERTS, Judge, presiding. Heard in this court at the August term, 1895. Reversed and remanded. Opinion filed March 7, 1896.

A. NEY SESSIONS and JAMES LINGLE, attorneys for appellant.

DODD & PICKRELL, attorneys for appellee.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

This suit was brought on an accident policy to recover the sum specified during the time of disability. A verdict and judgment were obtained, from which this appeal is prosecuted. The only point that we desire to consider is the limitation to suits provided by the by-laws, which is:

“No suit shall be commenced or maintained against this association unless the same shall be commenced within thirty days from and after the date of the refusal of this association to entertain a claim or pay an award. The failure of this association to pay a claim within sixty days from the date of filing with the association of proofs thereof, shall be construed by the member as a refusal on the part of the association to pay said claim, and no suit or proceeding at law shall be brought by said member, his heirs, executors, administrators or assigns, unless the same shall be commenced within thirty days from the expiration of said sixty days hereinbefore mentioned.”

The appellant seems to be a mutual accident association, with by-laws which, by the policy, are made a part of the contract. The evidence shows the proof of the claim was made on the 20th day of October, 1893, and the suit was not begun until March 6, 1894. More than ninety days had elapsed after filing the claim before bringing the suit. This is attempted to be excused by the introduction of a letter and telegram from the secretary of the company, written on the 1st and 4th of March, 1894, respectively, which was in substance a request for an interview, without a promise

to recognize the claim. The interview did not take place. There is no evidence of a promise to pay this claim within the ninety days, or of any negotiations looking to its settlement within that time.

These contractual limitations have been sustained in *Peoria Marine Ins. Co. v. Whitehall*, 25 Ill. 466, and other cases. A request on the part of the company for more time, or the holding out of hopes that the matter will be adjusted, will waive the time limit. *The Andes Ins. Co. v. Fish*, 71 Ill. 620; *Home Ins. Co. v. Myer*, 93 Ill. 271. But it has been held that mere negotiations for a settlement will not have that effect. *Allemania Ins. Co. v. Little*, 20 Ill. App. 431; *Phenix Ins. Co. v. Lebcher*, 20 Ill. App. 450, citing cases.

The evidence does not show a waiver, and therefore we are constrained to reverse and remand the case.

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**Frederick Rabbermann v. S. R. Callaway, Receiver of  
the Toledo, St. Louis & Kansas City  
Railroad Company.**

1. *NEGLIGENCE—When Contributory is Not a Defense.*—If contributory negligence does not tend to cause an injury, it is no defense to an action for the same.

2. *RAILROADS—Damage by Fire—Trees Extending over the Right of Way.*—A railroad company has no legal right to set fire to combustible material upon its right of way and by so doing burn the limbs of trees standing upon the lands of the adjoining owner, but extending over the right of way.

3. *INSTRUCTIONS—Must be Based upon Evidence.*—An instruction supported by no evidence in the case, is erroneous.

**Trespass on the Case.**—Damage by fire, etc. Appeal from the County Court of Madison County; the Hon. WILLIAM R. EARLY, Judge, presiding. Heard in this court at the August term, 1895. Reversed and remanded. Opinion filed March 7, 1896.

HADLEY & BURTON, attorneys for appellant.

The tree injured by the fire on the right of way was part of the realty belonging to appellant; the body of the tree



was wholly on his land; it was there before the railroad was built, and appellant was entitled to the fruit which it bore, even on the branches which overhung the right of way. Appellee had the right to clip off the limbs which extended over the right of way, but is liable for the injury done by fire. 26 Am. & Eng. En. of Law, Vol. 558; Tiedeman on Real Property, Sec. 9, Trees.

BAYLES, GUENTHER & CLARK, attorneys for appellee; CLARENCE BROWN, counsel.

Appellant correctly states the principle that the appellee had the right to abate the nuisance of branches overhanging the right of way by clipping them, but in no instance do the authorities cited intimate, in any way, that a land owner would be liable for injury done to overhanging branches by fire.

Land embraces not only the surface of the earth and everything that grows upon it, or is in law permanently attached to it, but everything that lies beneath it or is included in the space above it. Metals within their native beds, the atmosphere that rests above the surface, are land. The owner is said to own from the center of the earth to the highest heavens; and no other person can lawfully, without his consent, appropriate any portion of the space above the surface, or of the minerals below it. Robinson's Elementary Law, Sec. 44.

Blackstone, in his Commentaries, says that "land hath an indefinite extent upwards as well as downwards; therefore no man may erect any building or the like to overhang another's land;" so that the word "land" includes not only the face of the earth but everything under it or over it.

This principle has become a maxim of the law. *Cujus est solum, ejus est usque ad coelum.*

Trees whose branches extend over the land of another are not nuisances, except to the extent to which the branches overhang the adjoining land. To that extent they are technical nuisances, and the person over whose land they extend may cut them off, or have his action for damages, if

any have been sustained therefrom, and an abatement of the nuisance against the owner or occupant of the land on which they grow; but he may not cut down the tree, neither can he cut the branches thereof beyond the extent to which they overhang his soil. Wood's Law of Nuisances, Sec. 108; *Grandona v. Lovdal*, 70 Cal. 161, 11 Pac. Rep. 623.

MR. PRESIDING JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

This suit was brought before a justice of the peace by appellant to recover damages for killing of two hogs and for damage by fire to an apple tree growing on his land. The trial before the justice resulted in a judgment for appellant, and appellee took an appeal to the County Court, where there was a verdict and judgment for defendant, to reverse which plaintiff took this appeal.

The 11th instruction given for defendant was erroneous and misleading. By it the jury were told that if the animal in question entered upon defendant's right of way because of the defective condition of the fence, and was killed, the plaintiff could not recover, "if it further appears the plaintiff was guilty of contributory negligence, as compared with the negligence of the defendant." If the contributory negligence did not tend to cause the injury, it would not relieve the defendant from liability, and this instruction does not in any way connect the contributory negligence with causing the injury.

The 13th instruction for defendant was erroneous in informing the jury the plaintiff could not recover damages to the tree of plaintiff, if the sparks from defendant's engine set fire to the grass, weeds and other dangerous combustible material on the right of way, and that such fire burned and scorched the limbs of said trees so extending over the right of way. Such is not the law.

The 14th of defendant's instructions informed the jury, if it appears from the evidence that the trees in question were planted by plaintiff or his predecessors in title, on or near the line of the right of way, after such right of way

had been acquired by defendant, or its predecessors in title, then the plaintiff and his predecessors will be presumed to have assumed all the risks of damage by fire caused by a proper operation of the company's railroad, and if the damages to the trees in this case were so caused, the plaintiff can not recover. There was no evidence that the damage to trees was caused by proper operation of defendant's railroad, and hence no evidence appears upon which to base this instruction.

The 15th instruction given for defendant informs the jury of the duty of railroad companies to keep their right of way free and clear from all dead grass, dry weeds, and other dangerous and combustible material, and then says if it appears from the evidence that defendant, for the purpose of complying with this requirement of the law, set fire to dead grass, dry weeds, and other dangerous and combustible material on its right of way, then plaintiff could not recover for damage to his trees caused by fire so set. This instruction, like the 14th, was not supported by any evidence tending to show the fire was set by defendant for any such purpose as therein stated, and it was error to give it.

The 16th instruction is also erroneous in instructing the jury that plaintiff is not entitled to recover any damage for injury to the apple trees caused by fire escaping from the engines of defendant, and setting on fire the combustible material on the right of way, or caused by the defendant burning off such combustible material, if such fire, without negligence of defendant, burned and scorched the said trees and limbs thereof hanging over the right of way of the defendant. If the tree of plaintiff was damaged by firing of combustible material on the right of way, caused by fire escaping from defendant's engine, plaintiff would have the right to recover for such damage so caused. The fact that the same fire may have scorched the tree and limbs thereof, hanging over the right of way, would not absolve defendant from liability for its negligence so causing the fire and damage. For the error in giving the said instructions, the judgment is reversed and cause remanded.

**Robert B. F. Pierce, Receiver of the Toledo, St. L. & K.  
C. R. R. Co., v. Annie M. Gray.**

1. RAILROAD—*Length of Time Allowed Passengers to Alight.*—The length of time which should be allowed for passengers to alight from a railroad train depends on the number of passengers who are to leave the train, their agility, incumbrances, and all the circumstances bearing upon the occurrence, and the question, "Were the servants of the company guilty of negligence in not allowing such passengers sufficient time to leave the train?" is for the determination of the jury.

**Trespass on the Case, for personal injuries.** Appeal from the Circuit Court of Madison County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding. Heard in this court at the August term, 1895. Affirmed. Opinion filed March 7, 1896.

W. P. TYLER and CHARLES G. GUENTHER, attorneys for appellant; CLARENCE BROWN, of counsel.

W. E. WHEELER, JR., and HADLEY & BURTON, attorneys for appellee.

MR. JUSTICE SOOFIELD DELIVERED THE OPINION OF THE COURT.

On March 1, 1895, appellee rode from East St. Louis to Glen Carbon on one of the passenger trains of the Toledo, St. Louis and Kansas City Railroad Company, and reached her destination after nightfall. There were four cars in the train, of which the chair-car was the third from the engine. Appellee entered the chair-car at the rear, and delivered her satchel and parcels to the porter, who deposited them near the table. Appellee, her little boy, and Miss Edna Mason occupied seats in the rear of the coach.

Glen Carbon, though a town of about eight hundred inhabitants, was nevertheless a flag station, with a platform composed of cinders, and a depot seven by thirty feet in dimensions, made of a box-car set flat upon the ground. The platform was lighted by a street lamp seventy-five feet from the depot, and by such lanterns as the trainmen and citizens saw fit to display.

The train was flagged and stopped, both to receive and discharge passengers. Six passengers left the train, and five went aboard. The conductor had taken appellee's ticket, and knew that she was to get off at Glen Carbon. Appellee and her little boy and Miss Mason started to leave the train at the rear entrance. The passage-way was at the side of the car, but there was no difficulty in making the exit. The conductor and brakeman were at the other end of the car. But it was not negligence *per se* for appellee to leave the coach at the rear entrance.

The evidence is conflicting as to what occurred as the three were attempting to descend the steps to the cinder platform. Appellant contends that the train was in motion—that it had moved probably twenty or twenty-five feet—when appellee jumped from the train. Therefore, it is said that appellee's negligence in jumping from the moving train precludes a recovery, as would also the variance between the proof and the declaration, which alleged that the train was suddenly and violently started and appellee thereby thrown to the ground.

The evidence, however, does not show that appellee jumped from the train, but on the contrary sustains the allegations of the declaration. The jury were justified in finding that as appellee, a large, fleshy woman, was descending the steps, the train was started and appellee was thrown upon the cinder platform and injured.

Was appellee exercising due care at the time of the injury? This was a question for the jury.

Were the servants of the railroad company guilty of negligence in not allowing sufficient time for passengers to leave the train? This was a question for the jury.

The length of time which should be allowed depends on the number of passengers who are to leave the train, their agility, their incumbrances, and all the circumstances bearing on the particular occurrence as shown by the evidence. A fleshy woman has a right to ride on a train and to have a valise and parcels, and she is entitled to more time for alighting than might be required for a foot-racer or a grey-

hound. In this case the jury were justified in finding that the company was guilty of negligence in not allowing a reasonable time for appellee to leave the train.

There was no error in the charge to the jury. The first instruction, given at the request of appellee, is practically the same as instruction numbered four, commented upon and approved in *C. & A. R. R. Co. v. Byrum*, 153 Ill. 131. The use of the word *reasonably* in the instruction negatives the assumption of an absolute liability. There was no attempt to state in this instruction anything more than the duty of the railroad company, and the instruction is not open to the criticism that it contains no requirement of due care on the part of appellee, and especially so when it is remembered that the jury were informed by other instructions that appellee could not recover unless she was herself exercising due care at the time of the injury. Even if the third instruction given for appellee was inapplicable to the case under the evidence, it is not permissible for appellant to take advantage of the error after having asked and procured the submission of instructions upon the same questions.

Such propositions of law in appellant's refused instructions as have a legitimate bearing on the case were given to the jury in other instructions. The damages are not excessive.

The judgment is affirmed.

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### F. A. Rehkopf v. Pat McCambridge.

1. BRIEFS—*Failure to File—Reversal.*—A failure to file briefs on the part of an appellee amounts to a confession of the errors in the record.

Replevin.—Appeal from the Circuit Court of Madison County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding. Heard in this court at the August term, 1895. Reversed *pro forma* and remanded.

SYLVESTER G. ABBOTT, attorney for appellant.

C., P. & M. R. R. Co. v. Daniel.

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MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

The judgment in this case must be reversed *pro forma*, under the 31st rule of this court, because of the failure of appellee to file briefs, which amounts to a confession of error in the record.

The judgment is reversed and the cause is remanded.

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Chicago, P. & M. R. R. Co. v. James M. Daniel.

1. INSTRUCTIONS—*Erroneous, Will Not Always Reverse*.—When a judgment for damages to property arising from the construction of a railroad is clearly right under the evidence it will not be reversed for errors in instructions on the question of damages.

**Trespass on the Case.**—Damages to lands, etc. Appeal from the Circuit Court of Jefferson County; the Hon. EDMUND D. YOUNGBLOOD, Judge, presiding. Heard in this court at the August term, 1895. Affirmed. Opinion filed March 7, 1896.

J. H. ATTERBURY, attorney for appellant.

F. G. BLOOD and JONES & BLAIR, attorneys for appellee.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

Appellee sued appellant for damages to his property in the city of Mt. Vernon, arising from the construction of appellant's railroad, and recovered judgment for \$175.

It is said that the court erred in the instructions to the jury on the question of damages. Even if the court did so err, the judgment should not be reversed if it is clearly right under the evidence. We are of the opinion that the verdict is not excessive, but that, on the contrary, a larger verdict would have been justified.

The judgment is affirmed.

**Chicago, P. & M. R. R. Co. v. Charles W. Morpew.**

1. **TRIALS—Remarks of the Judge.**—An objection to the remarks of the court when ruling upon evidence where such remarks applied to the witnesses' statement of what he was taking into consideration in estimating damages, rather than the amount of his estimate, is not well taken.

**Trespass on the Case.**—Damages to lands, etc. Appeal from the Circuit Court of Jefferson County; the Hon. EDMUND D. YOUNGBLOOD, Judge, presiding. Heard in this court at the August term, 1895. Affirmed. Opinion filed March 7, 1896.

J. H. ATTERBURY, attorney for appellant.

JONES & BLAIR and F. G. BLOOD, attorneys for appellee.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

Appellee recovered a judgment for damages to his property occasioned by the construction of appellant's road along a street on which his property abutted. The record has been carefully examined, and the evidence fully sustains the judgment. It is not claimed that appellee was not entitled to recover damages, so that the amount was a matter peculiarly within the province of the jury to determine. The witnesses differed, as they always do, as to the amount, but the verdict returned, on which judgment was entered, was less than the average estimate, and, as we think, very reasonable. The property was unquestionably depreciated in value by the construction of the road. There is no material objection to the evidence admitted by the court. The objection to the remarks of the court, when ruling on certain evidence, is not well taken, for the reason the remarks applied to the witness' statement of what he was taking into consideration in estimating damages, rather than to the amount of his estimate. The instructions are substantially correct, and substantial justice has been done. No error was committed in the trial that would justify this court in reversing this judgment.

The judgment therefore is affirmed.



**Chicago, P. & M. R. R. Co. v. Charles H. Pigg.**

1. INSTRUCTIONS—*Error in, When Not Reversible.*—In action to recover for damages to property by the construction of a railroad, if the verdict is justified by the evidence the judgment will not be reversed because the measure of damages may have been improperly stated in the instructions.

**Trespass on the Case.**—Damage to lands, etc. Appeal from the Circuit Court of Jefferson County; the Hon. EDMUND D. YOUNGBLOOD, Judge, presiding. Heard in this court at the August term, 1895. Affirmed. Opinion filed March 7, 1896.

J. H. ATTERBURY, attorney for appellant.

F. G. BLOOD and JONES & BLAIR, attorneys for appellee.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

Appellee sued appellant for damages to his property in the city of Mt. Vernon, arising from the construction of appellant's railroad, and recovered a judgment for \$55.

It is contended that the measure of damages was improperly stated to the jury. However that may be, the verdict is justified by the evidence and the judgment should be sustained.

The judgment is affirmed.

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**Chicago, P. & M. R. R. Co. v. Jerry Moore.**

1. ELEMENTS OF DAMAGES—*Railroad in Streets—Abutting Owners.*—In determining the amount of damages which a person has sustained by reason of the location of said railroad across or near his premises, it is proper for the jury to take in consideration the close proximity of the railroad to his premises, the greater danger of fire being caused by sparks from engines while running along the road, and also the annoyance by the noise and jarring caused by the engines and trains upon the track, and smoke, cinders and dust from engines.

2. *SAME—Obstruction to Drainage.*—In determining the amount of damages sustained by reason of the location of a railroad in the streets in front of a person's premises, the jury may take into consideration any injury caused by changing the grades of the streets and the land so as to obstruct the drainage and cause water to stand upon such premises, or the streets and alleys which afford him means of egress to his premises.

*Trespass on the Case.*—Damages to lands, etc. Appeal from the Circuit Court of Jefferson County; the Hon. EDMUND D. YOUNGBLOOD, Judge, presiding. Heard in this court at the August term, 1895. Affirmed. Opinion filed March 7, 1896.

J. H. ATTERBURY, attorney for appellant.

F. G. BLOOD and JONES & BLAIR, attorneys for appellee.

MR. PRESIDING JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

This was an action of trespass on the case brought by appellee against appellant, to the May term, 1895, of the Jefferson County Circuit Court, to recover damages for injury done to property of appellee by the location and operation of the railroad of appellant. A trial was had before the court and a jury at the May term, 1895, of said court, which resulted in a judgment for plaintiff and against defendant, for \$60. Defendant moved for a new trial, which the court overruled, and the defendant prayed an appeal, and now brings the record here.

The only reasons urged for reversal of the judgment are, the giving of instructions "one" and "five" for plaintiff, and refusing to give the seventh instruction for defendant.

The instruction "one" for plaintiff informed the jury that in determining the amount of damages plaintiff had sustained, they had the right to consider the close proximity of said railroad to his premises, the danger of fire being caused by sparks from engines, while running, to buildings on his premises, the annoyance to himself and family by the noise and jarring of passing trains moving along defendant's track, and the annoyance caused by smoke, cinders and

dust from said engines. All these causes tended to depreciate the value of plaintiff's property and were proper to be considered by the jury in estimating the damages to plaintiff. The giving of this instruction was not an error. The said fifth instruction called the attention of the jury to their right to consider the injury to plaintiff by reason of the change of the grade of street and land near plaintiff's premises, by defendant, in locating its railroad, so as to obstruct the drainage and cause water to stand upon his premises, or streets and alleys which lead to his premises. This was also a proper element of damage to be considered by the jury, and the instruction was right. The seventh instruction requested by defendant and refused by the court, restricted the jury in the damages they could find, to such damages only as would be caused by reason of "cutting off access to plaintiff's premises" and "damages from fire." This instruction was properly refused.

We find the evidence warranted the verdict; that the jury were fairly instructed, and no reason for reversing the judgment appears. The judgment is affirmed.

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### Illinois Central Railroad Company v. Martin Creighton.

1. **ORDINARY CARE—Question as to the Exercise of—Verdict—When Conclusive.**—Where there is a conflict of evidence upon the question as to whether the plaintiff, at the time of the injury, was in the exercise of ordinary care, the verdict of the jury is conclusive, no error having been committed in the giving of the instructions.

2. **INSTRUCTIONS—When Parties Estopped to Object.**—Where a party has given in his behalf, an instruction upon a certain doctrine, he will be estopped from questioning instructions upon the same doctrine given for the adverse party.

3. **SAME—Duplicates.**—It is not error to refuse an instruction where the same proposition of law is contained in other instructions given for the same party.

4. **VARIANCES—Must be Raised in the Court Below.**—The question of a variance between the pleadings and the proofs can not be raised for the first time in the Appellate Court.

5. **MASTER AND SERVANT—Defective Machinery—Promises to Repair.**—A railroad company furnishing an engineer with an unsound engine and inducing him to continue his work by a promise to repair it can not hold him to the exercise of an unerring choice of the best method of obviating difficulties and lessening dangers in operating it. If he uses reasonable and ordinary judgment it is all that can be required, and the fact that his judgment may not prove to be absolutely the best does not relieve his employer from liability.

6. **SAME—Effects of Promises to Repair Defects.**—When the master has knowledge of the defects, and promises to repair the same as soon as possible, he impliedly requests the servant to continue to work and that he, the master, will take upon himself the responsibility of any accident that may occur by reason of such defects within a reasonable time after such promise.

7. **NEGLIGENCE—Proximate Cause of an Injury.**—To constitute a negligent act the connection between the act and the result need not be such that the particular injury could have been foreseen. If injury in some form would be the natural sequence, the party guilty of negligence must be held as warned of the danger of his course and admonished of the necessity of guarding against liability for his negligence, and this is all the warning to which he is entitled under the law.

**Trespass on the Case, for personal injuries.** Appeal from the Circuit Court of Alexander County; the Hon. OLIVER A. HARKER, Judge, presiding. Heard in this court at the August term, 1895. Affirmed. Opinion filed March 7, 1896.

GREEN & GILBERT, attorneys for appellant.

BOYER & BUTLER, attorneys for appellee.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

The first judgment in this case was reversed for error in the instructions. I. C. R. R. Co. v. Creighton, 53 Ill. App. 45. The case has been tried again, and another judgment has been rendered in favor of appellee, and another appeal has been prosecuted to this court by the railroad company.

In contrasting the present with the former record, appellant says: "There is no change in the evidence, except in its volume. The change is in cumulative evidence. There is no conflict in the evidence on any question, except as to

whether appellee was using ordinary care at the time of, and immediately before, the accident."

Under this concession, it is unnecessary for us to do more than refer to our former opinion for a statement of the facts.

The only conflicting question of fact, according to appellant's admission, is whether or not appellee was exercising ordinary care at the time when he was hurt. There was, indeed, such a conflict of the evidence on this point, that the verdict of the jury in favor of appellee must be regarded as decisive of the question.

We have examined the instructions carefully, and have found no error in the giving or refusing of instructions. It is said that appellee's ninth instruction states the rule of comparative negligence, and that this is error, for the reason that the doctrine of comparative negligence is no longer a part of the law of this State. Without discussing this point, it is sufficient to say that the same doctrine is announced in appellant's tenth instruction, and that appellant is estopped from taking advantage of the alleged error. *Springer v. City of Chicago*, 135 Ill. 552. Nor was it error for the court to refuse certain instructions asked by appellant, for the reason that every proposition of law in the refused instructions which was applicable to the case was contained in some one of the seventeen instructions given at appellant's request. *Weber Wagon Co. v. Kehl*, 139 Ill. 644.

It is contended that the declaration is not sufficient to support the verdict under the evidence, because the allegations of negligence on the part of appellee are not sufficiently specific. The declaration alleges that appellant carelessly and negligently failed and refused to furnish appellee a safe, sound and suitable engine, and that the injury resulted from this neglect of duty. Now, if appellant thought that the unsoundness of the engine was averred too generally, it should have stood by its demurrer instead of pleading and submitting the issues to a jury. There is no variance. The accident did occur because the engine was unsound and unsafe, and upon this ground the judgment must be sustained,

if sustained at all. But even if there was a variance, the question was not raised in the court below, and can not now be raised in this court. *I. & St. L. R. R. Co. v. Estes*, 96 Ill. 470; *Wight Fire Proofing Co. v. Poczekai*, 130 Id. 139; *Consolidated Coal Co. v. Wombacher*, 134 Id. 57; *C., B. & Q. R. R. Co. v. Dickson*, 143 Id. 368.

The foregoing questions, however, are not the principal matters in controversy between the parties. Counsel for appellant argue vigorously that the unsoundness of the engine was not the proximate cause of the accident, that appellee was guilty of contributory negligence in plugging the holes in the cylinder and in improperly handling the engine, and that he assumed the hazards of the service by working with an engine which he knew to be dangerous. For either of these reasons, irrespective of any other, it is insisted that the judgment should be reversed. In other words we are asked to hold that appellee has no cause of action whatever.

Was the negligence of appellant in not furnishing a sound engine, the proximate cause of the injury? That appellant is charged with notice of the unsoundness of the engine is beyond question. But it is said that certain acts of the appellee constituted intervening causes, which broke the causal connection between the negligence of appellant and the injury.

If appellee had not plugged the cylinder holes, if he had not set the lever in front of the center, the accident would not have occurred; therefore, appellee's own act was the proximate or efficient cause of his injury. Such is the argument. But the jury have found that appellee was not guilty of negligence, and therefore that each of the acts mentioned was a proper and ordinarily careful effort on his part to remove or overcome difficulties arising from the negligence of appellant. In such a case, a railroad company, furnishing a servant with an unsound engine, and inducing him to continue his work by a promise to repair, can not hold that servant to the exercise of an unerring choice of the best method of obviating difficulties and lessening dan-

ger. If the servant uses reasonable and ordinary judgment, he does all that can be required, and the fact that his judgment may not prove to be absolutely the best, does not relieve the employer from liability. The unsound condition of the engine necessitated a choice between two evils; the inability to see on account of escaping steam, or some difficulty in handling the lever, on account of the plugging of the cylinder holes. Besides, there was evidence tending to show that appellant was chargeable with notice that the cylinder holes had been plugged. The jury found, in effect, that appellee did his duty in plugging the cylinder holes, and that this act was the natural sequence of appellant's negligence.

So with reference to the act of putting the lever in front of the center. Under the circumstances of the case, which sufficiently appear in the statement of the facts in our former opinion, the jury were justified in finding that the act in question was not negligence.

Now, if appellee had failed in his attempt to reverse the lever, and had been injured by a collision with the passenger train, appellant's negligence would have been the proximate cause of the injury. But it is said that appellee ruptured and otherwise injured himself in a successful effort to reverse the lever, and that such an injury received in such a manner could not have been foreseen or anticipated as the result of appellant's negligence, and that therefore appellant's negligence can not be regarded as the proximate cause of the injury.

There are at least two answers to this argument. In the first place, it is not the law that, to constitute a negligent act, the connection must be such that the particular injury could have been foreseen. If injury in some form would be the natural sequence of the negligence, the party guilty of negligence is warned of the danger of his course, and admonished of the necessity of guarding against liability for his negligence, and this is all the warning to which he is entitled under the law. Such is the law as laid down in *Pullman Palace Car Co. v. Laack*, 143 Ill. 242. We quote from the opinion, on p. 260, as follows:

"We said in the Fent case, that so far as the case turned upon the issue of remote or proximate cause, the jury should be instructed that if the loss is a natural consequence of the alleged carelessness, which might have been foreseen by any reasonable person, the defendant is responsible, but is not to be held responsible for injuries which could not have been foreseen or expected as the result of the negligence. This is not to be understood as requiring that the particular result might have been foreseen, for if the consequences follow in unbroken sequence from the wrong to the injury, without an intervening efficient cause, it is sufficient if, at the time of the negligence, the wrongdoer might, by the exercise of ordinary care, have foreseen that some injury might result from his negligence. *Baltimore, etc., Railroad Co. v. Keen*, 61 Md. 154; *Milwaukee, etc., Railroad Co. v. Kellogg*, 94 U. S. 469; *Terre Haute, etc., Railroad Co. v. Buck*, 96 Ind. 346, and the cases collected; 4 Am. and Eng. Ency. of Law, 42; *Consolidated Ice Machine Co. et al. v. Keifer*, 134 Ill. 481; *La. Mut. Ins. Co. v. Tweed*, *supra*; *Miller v. St. Louis, etc., Railroad Co.*, 90 Mo. 389; *Kellogg v. Chicago Railroad Co.*, 26 Wis. 223; *Smith v. London, etc., Railroad Co.*, L. R., 6 C. P. 21; *Bevan on Negligence*, 80-81. Thus, in the *Keifer* case, *supra*, it could not be foreseen that the particular injury might follow the placing of the tank upon an insufficient support. It might have fallen and injured no one, or a person other than appellee's intestate. It was held sufficient that the support was so insufficient that injury might result from the falling of the tank."

Other cases which have a bearing on the question are *Weber Wagon Co. v. Kehl*, 139 Ill. 644; *Anderson Pressed Brick Co. v. Sobkowiak*, 148 Id. 573; *Drop Forge and Foundry Co. v. Van Dam*, 149 Id. 337.

In the second place, it is worthy of notice that the act of appellee in reversing the lever, to his own injury, should be regarded as having been done by appellant's command. It is taken for granted, as the jury have found, and were justified in finding, that appellee was in the exercise of ordinary care from first to last. This being true, he was confronted



with an extraordinary situation. The forward movement of the engine threatened the wrecking of a passenger train, and a consequent loss of property, and a possible destruction of the lives of innocent persons. The pecuniary loss to the railroad company might have been very great. In such case it was the duty of appellee to make an extraordinary effort to stop the engine. This means that if the highest officials of the road had been present, they would have cried out: "Stop that engine at all hazards!" The word duty indicates that the command, though not expressed in words, was at least implied. Without negligence on his part, appellee was injured in the discharge of his duty, which duty devolved upon him because of the negligence of his superior, and this negligence was the proximate cause of the injury.

The question of contributory negligence has been sufficiently touched upon already, and will not receive further attention in this opinion.

One other question remains to be considered. Did appellee, by using the engine which he knew to be unsafe, assume the hazards of this part of the service?

On each of the 11th and 12th days of March, appellee obtained a promise from the proper agent of the company, that the engine would be repaired that night; but the promise was not fulfilled in either instance. The injury was received about half past nine on the morning of the 13th. It is conceded that if the injury had been received while either promise was in effect, or if a new promise had been made on the 13th, before the accident, the promise would have justified appellee in continuing to use the unsafe engine. *Missouri Furnace Co. v. Kehl, supra*. In *Anderson Pressed Brick Co. v. Sobkowiak, supra*, the reason for the above rule is stated in the following language:

"The reason for this exception may be stated to be that when the master has knowledge of the defects, and promises to repair the same, he impliedly requests the servant to continue to work; and that he, the master, will take upon himself the responsibility of any accident that may occur during the period."

It is true that the promise on the 12th was to repair the engine that night, but the engine was not repaired, and the injury was received on the morning of the following day. But the promise to repair that night, made on the 11th and repeated on the 12th, merely showed an intention to repair as soon as possible, without an absolute limitation to that particular time. Surely it will not be contended that appellant's agent intended to say that if the engine was not repaired that night, it would not be repaired at all. The gist of the promise was that the engine should be repaired without delay, and appellee was justified in regarding this promise as continuing for a reasonable time beyond the night of the 12th. *Drop Forge & Foundry Co. v. Van Dam, supra.*

We have found no error in the record, and therefore the judgment is affirmed.

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### Illinois Central Railroad Company v. Frank Harris.

1. PRACTICE—*Evidence in Chief—On Rebuttal.*—The question of the admissibility of evidence in chief upon rebuttal can not be raised where such evidence was admitted without objection upon the ground of its being evidence in chief.

2. EVIDENCE—*What is Proper on Rebuttal.*—When the defendant undertook to show that the plaintiff was guilty of negligence because a coupling might have been made more safely in another manner, it is proper for the plaintiff to meet this evidence by showing in rebuttal that the coupling was ordinarily and properly made as the plaintiff made it.

3. REBUTTAL—*Evidence in—Discretionary with the Court.*—The admission or exclusion of evidence in rebuttal is a matter resting in the discretion of the trial court, the exercise of which is not subject to review except in cases of gross abuse.

4. INSTRUCTIONS—*When a Party can not Object.*—When a party asks for, and has given in his behalf, instructions upon a certain theory of the case, he can not for that reason successfully urge that the giving of instructions for his adversary upon the same theory is erroneous.

5. PLEADING—*Absence of Allegations as to Fellow-Servants.*—In a suit against a corporation, the allegation that the corporation itself negligently did the acts complained of, excludes *ex vi termini* the theory

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that the acts were committed by parties for whom the corporation was not responsible.

6. *DAMAGES—\$3,000 Not Excessive.*—The amount of damages for which a recovery may be allowed depends on the circumstances of the case, and is not a matter of exact mathematical calculation. In this case, for the loss of a hand, \$3,000 was held not to be excessive.

*Trespass on the Case, for personal injury.* Appeal from the Circuit Court of Jackson County; the Hon. OLIVER A. HARKER, Judge, presiding. Heard in this court at the August term, 1895. Affirmed. Opinion filed March 7, 1896.

W. W. BARR and WILLIAM H. GREEN, attorneys for appellant.

WILLIAM A. SCHWARTZ, attorney for appellee.

MR. JUSTICE SCOFFIELD DELIVERED THE OPINION OF THE COURT.

Upon the trial of this case, after appellee had introduced evidence to show appellant's negligence, the manner in which the injury was received, and the extent of the injury, appellant introduced evidence to show that it was negligence for appellee, in coupling double buffer cars, to put his hand in horizontally between the buffers, and that the only safe way of making such a coupling was to take hold of the link by putting the hand and arm underneath the buffer. Appellee had proved in chief, by general evidence only, that he was in the exercise of ordinary care at the time when he was hurt. In rebuttal he was permitted to call a number of brakemen to show that it was proper and safe to make the coupling by putting the hand in horizontally when the cars were moving as slowly as they were in this instance. It is said that this evidence was not admissible in rebuttal.

No objection whatever was made to the testimony of Livsay, Reader, Gosley and Hamilton, four of the witnesses who testified on this question in rebuttal. The only objection to the testimony of Ross was to a question which was not answered; and the objection to the testimony of the other six witnesses was a general objection, made either before

the witness had begun or after he had finished his testimony. No question answered by any of these witnesses was objected to after it had been propounded and before it was answered. Hence, the question as to whether or not this evidence was admissible in rebuttal is not properly before us.

But, on the merits of the question we are of the opinion that the evidence should have been admitted. Appellant undertook to show that appellee was guilty of negligence because the coupling might have been made more safely in another manner. It was proper for appellee to meet this evidence by showing that the coupling was ordinarily and properly made as appellee made it.

But the law is well settled that the admission or exclusion of evidence in rebuttal is a matter resting in the discretion of the trial court, the exercise of which discretion is not subject to review, except in cases of gross abuse. 1 Thompson on Trials, Sec. 346; *City of Sandwich v. Dolan*, 42 Ill. App. 53; *Gray v. Bonfield*, 59 Id. 381.

Complaint is made of the ruling of the court in giving appellee's third instruction, which is as follows:

"If you believe from the evidence that the defendant did not use reasonable care in providing cars with sound coupling appliances, but used two cars with split and slivered drawbars and drawheads, and that the plaintiff, while attempting to make a coupling between the two cars, was injured by reason of a defective drawbar or drawhead attached to said cars, and further believe from the evidence that the plaintiff, in attempting to make such coupling, used reasonable care and caution for his personal safety, you should find defendant guilty."

The manner of the accident, as charged in the first and second counts of the declaration, was that appellee's glove became fastened on the broken, slivered, split and unsafe drawbar, or face of the drawbar, so that he could not withdraw his hand in time to avoid the injury. This allegation, in effect, is also found in the third count, but coupled there with the additional allegation that the drawbar was without sufficient fillers, which allowed the buffers to strike against the car, whereby appellee's hand and wrist were crushed.

It may be that the foregoing instruction is couched in terms less specific than the allegations of the declaration. But the question is not to what extent the instructions might be improved upon by careful consideration after the heat of the conflict, but to what extent was the consideration of the case by the jury improperly affected by the oversight complained of.

The court instructed the jury, at the instance of each party, that it was incumbent on appellee to prove every material allegation of the declaration, or of some count thereof, by a preponderance of the evidence, before he could recover. Immediately following one of these instructions was the instruction above quoted. Naturally enough, the two instructions, on account of their juxtaposition, would be read and considered together, and the third instruction would be regarded as applicable only to the case stated in the declaration.

Besides, the sixth and eleventh instructions given at the request of appellant were based upon the same theory as appellee's third instruction, and appellant can not for that reason successfully urge that the giving of the latter was error. *Consolidated Coal Co. v. Haenni*, 146 Ill. 614, and cases therein cited, and *C. & A. R. R. Co. v. Sanders*, 154 Id. 531.

The court gave all of appellant's instructions, and none but appellee's third instruction is complained of; and that did not mislead the jury, for the case was tried throughout upon the theory that unless appellee's glove was caught and held by the slivers of the drawbar, there could be no recovery.

Appellant seems to feel aggrieved because surgeons and others were permitted to testify with reference to appellee's wounded hand and wrist, when the necessity for amputation was conceded, and also because the hand, preserved in a jar of alcohol, was exhibited to the jury. No objection was made to the exhibition of this reminiscence of the past, and the concession that amputation was necessary was made after the evidence on that subject had been given.

It is said that the motion in arrest of judgment should have been sustained on the ground that the declaration does not aver that the servants of appellant, who were responsible for the alleged unsafe condition of the cars, were not appellee's fellow-servants. The allegation that the defendant, that is, the corporation itself, negligently did the acts complained of, excludes, *ex vi termini*, the theory that the acts were performed by parties for whose conduct the defendant was not responsible. *Libby, McNeill & Libby v. Schermann*, 146 Ill. 540.

We come now to the consideration of the questions upon which counsel for appellant seems to rely most confidently for the reversal of the judgment; that is to say, that appellee was guilty of such negligence as precludes a recovery, and that appellant was not guilty of such negligence as creates a liability.

Fortunately we are not under the necessity at this time of making a detailed statement of the facts disclosed by this record. This case was before us at the February term, 1894, and the opinion published in 53 Ill. App. 592, with a few changes and emendations, may be adopted as a sufficiently accurate statement of the facts developed on the trial now under review. In that opinion it is said that the "uniform testimony of brakemen is that it is dangerous to project the arm straight through to the drawheads" in coupling these double buffer cars; also that many witnesses called by appellant testified that this could not be done with the hope of escaping injury. These remarks were undoubtedly pertinent in view of the record then before the court. But there is sufficient evidence in the present record to justify a jury in finding that the method of coupling adopted in this case was safe, proper and customary, considering the speed of the cars and the other circumstances of the case, and that no injury would have resulted to appellee if appellant had used reasonable diligence to keep the drawbars of the cars in a reasonably safe condition.

Eleven witnesses besides appellee testify in effect that the proper way of making this coupling was to put the hand

between the buffers, enter the link, and then withdraw the hand. We can not say that the jury were not justified in believing these men, all of whom had had experience in coupling double buffer cars.

There is sufficient evidence to justify a finding that the drawbar had been in an unsafe condition for some time before the injury and that appellant, by the exercise of reasonable diligence, ought to have known the fact. Parker, Lindsay, Smith, Hill and Tate testified that the split in the drawbar was an "old break," and others testified that it was rusty.

Burns, a brakeman on the train, saw the car at Centralia before the train left for Ashley, where appellee was injured, and says that the brake was an old one; that the edges of the broken parts were rough, and had slivers on them; that the draw-bar was unsafe; that appellee did not assist in making up the train, and that appellant had a car inspector and machine shops at Centralia. If the jury believed the testimony of these witnesses, the negligence of appellant was established notwithstanding appellant's opposing testimony.

The last point which we consider worthy of notice is the affirmation that the damages are excessive. One case referred to under this head is *I. C. R. R. Co. v. Welch*, 52 Ill. 185, in which a judgment for \$10,000 for the loss of the left arm was held to be excessive. This view of the matter was based upon a comparison of the injured man's income as a brakeman, which was \$480 per annum, with the income derivable from the judgment, which would have been ten per cent of \$10,000. Without desiring to sanction this method of estimating the damages, we are nevertheless willing to apply the rule to this particular case; \$8,000 at seven per cent interest, the highest rate now allowed by law, would yield an annual income of \$560. When appellee was hurt, he was earning from \$65 to \$70 a month, or from \$780 to \$840 a year, as a brakeman. But after appellee settles with his attorney for two trials in the Circuit Court, two appeals to this court, and one to the Supreme Court, and pays the costs in

the first appeal to this court, and for his briefs in the other appeals, and adjusts the incidental expenses attendant upon the luxury of litigation, the income-producing part of his judgment will not be \$8,000 by several ducats. If his income from money loaned should be half as much as he could have made as a brakeman with the two good hands God gave him, he may think himself fortunate.

It would be a useless task to undertake to reconcile all of the cases on the question of excessive damages. The amount of damages for which a recovery may be allowed depends on the circumstances of the case and is not a matter of exact mathematical calculation. *Chicago City Ry. Co. v. Wilcox*, 33 Ill. App. 450, may be referred to, where a judgment for \$15,000 for the loss of a leg was sustained, as may also *C. & A. R. R. Co. v. Pillsbury*, 123 Ill. 9, where a judgment for \$12,500 was not disapproved of, although the injury did not extend to the loss of a limb. Upon a consideration of the circumstances, we do not regard the judgment in this case as excessive.

The judgment is affirmed.

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### Madison Coal Co. v. Arthur Beam.

1. *PRACTICE—Objections to Declaration After Verdict.*—Where there is one good count in a declaration, the objection that another count is defective can not be made for the first time after verdict.

2. *SAME—Allowing the Jury to Separate.*—An objection that the court stated to the jury if they did not agree upon a verdict within an hour (it being then 11 P. M.) they might separate and come together again on the next day and further consider their verdict, no injury to the defendant being shown, is without force.

3. *NEW TRIALS—Newly Discovered Evidence.*—Where the newly discovered evidence relied upon for a new trial is merely cumulative and not conclusive, the motion is properly overruled.

**Trespass on the Case, for personal injuries.** Appeal from the Circuit Court of Madison County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding. Heard in this court at the August term, 1895. Affirmed. Opinion filed March 7, 1896.



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Madison Coal Co. v. Beam.

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E. C. SPRINGER, attorney for appellant.

C. L. COOK and E. B. GLASS, attorneys for appellee.

MR. PRESIDING JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

This suit was brought by appellee against appellant to recover damages for personal injury, averred to have been caused by the negligence of appellant. The jury found defendant guilty, and assessed plaintiff's damages at \$700. Defendant entered its motion for a new trial, which the court overruled, and entered judgment for the damages assessed and costs of suit. Defendant took this appeal and in the argument insists as reasons for reversal :

First. That the evidence does not sustain the first count of the declaration. It is averred in this count that defendant was on and before the 28th day of November, 1894 (the day the injury was received), the owner of and operated a certain coal mine in said county, and as such owner and operator it was its duty to keep a supply of timber on hand, to be used as props and cap-pieces, and deliver the same as required or needed by the miners in said mine, so that the miners or workmen in the employ of the defendant in said mine might at all times be able to properly secure the roof, or any part of said mine, for their own safety. Yet defendant, while it so owned and operated said mine, not regarding its said duty, on the day aforesaid, wrongfully and negligently failed and omitted to keep a supply of timber on hand, to be used as aforesaid, for props and cap-pieces, and failed to deliver the same, as required by law, when the same were needed and required in said mine, so that the workmen in said mine might be able to properly secure the workings of said mine for their own safety. . By means whereof, the plaintiff, who was then and there a workman in the employ of defendant, in said mine, and under the direction of defendant and its authorized agents, while he was with all due care, caution and diligence, and without fault on his part, under the direction of defendant and its authorized agents, loading

empty cars in said mine for defendant, was violently and with great force thrown down by means of a great mass of clod, dirt, stone and slate, comprising the roof of said mine, falling upon him, and which crushed and wounded his foot, causing the same to be permanently deformed, maimed and injured. And thereby plaintiff became sick, lame and disordered, and suffered and still suffers and will continue to suffer great pain, and was thereby prevented from transacting his business affairs, and was obliged to and did expend divers sum of money in and about endeavoring to be healed of said wounds and injuries.

We have examined the evidence in the record, and if the jury believed the witnesses for plaintiff, the material averments in said count were proved by their testimony, and although a conflict in the evidence upon these averments was raised by the evidence for defendant, yet the jury, who saw and heard the witnesses, and whose province it was to find the facts, determined in favor of plaintiff, and the trial court, with like opportunity to see and hear those who testified, approved the finding. Under these circumstances we decline to interfere and set it aside.

Second. It is objected that the second count of the declaration "proceeds upon the theory" that defendant is a guarantor or insurer of the safety of its servants, and thereupon the second and third instructions given for plaintiff are criticised—the second, because by it the jury were misinformed as to the duty imposed by law upon defendant with regard to propping the roof of the mine "as claimed in the declaration;" and the third, because it informed the jury to find defendant guilty, if they believed from the evidence "that the pit boss directed plaintiff to work where the shooter (Sauer) should tell him to work." We have examined the instructions *as shown by the record*, the abstract not containing those given for defendant, and feel satisfied that the jury were properly informed by said instructions as to the law, and desire further to say said third instruction, when *the whole* of it is considered, is correct. The second count of the declaration, if defective as claimed, was not demurred to,

but a plea of not guilty was filed to it, and said first count certainly sets up a good cause of action.

There being one good count pleaded to, the objection that another count is substantially defective, can not be made for the first time after verdict. *L. E. & W. R. R. Co. v. Middlecoff et al.*, 150 Ill. 34; and several earlier reported cases, announces this rule.

It is also objected that the court told the jury if they did not agree upon a verdict within an hour they might separate and come together again on the next day, and further consider their verdict. The jury failed to agree within the time, and at 11 o'clock P. M. separated, and met together again at 8 A. M. next day, and no injury or prejudice to defendant's rights by such separation is shown or suggested. This objection is without force.

The next, and only other objection that we shall refer to, is, that the court refused to grant a new trial on the ground of newly discovered evidence. This evidence was merely cumulative, and not conclusive. Hence it was not error to refuse a new trial on said ground. *Dyk v. De Young*, 133 Ill. 85; *Klein v. People*, 113 Ill. 596; *Wisconsin Cent. R. R. Co. v. Ross*, 142 Ill. 18, 19.

We are satisfied the verdict and judgment are right; that the appellee received serious injuries by reason of defendant's negligence, as complained of in said first count, and the damages assessed were not excessive.

The judgment is affirmed.

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**East St. Louis and St. L. Electric St. Ry. Co. v. Frederic Wachtel, Adm'r.**

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77	469
68	181
102	1325

1. *INSTRUCTIONS—Stating What Facts Constitute Negligence.*—An instruction which tells the jury, as a matter of law, that certain facts constitute negligence, is erroneous.

2. *TROLLEY CARS—Frightening Horses.*—The law does not imply that the driver of horses is in peril merely because the horses are frightened by a trolley car. In the absence of manifestations other than mere fright the fair presumption is that the driver will be able to control them.

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But if the manifestations are such as to show the motorman that the driver is in peril, it is his duty to do what he reasonably can to relieve him.

3. *SAME—Risks of the Driver of Horses.*—The law imposes a duty upon persons in charge of trolley cars to give certain signals under certain circumstances, and the driver of horses going into the presence of such cars takes the ordinary risk of being able to control his horses.

4. *SAME—Duty of the Driver of Horses.*—It is the duty of the driver of horses in the presence of trolley cars to have ordinary appliances for controlling his horses if frightened and to be in a reasonably suitable position to use such appliances.

5. *SAME—When the Company is not Liable.*—If horses become frightened at trolley cars and run away because of weak and insufficient lines to hold them, the company operating the trolley can not be held liable for damages done by such horses, nor can it be liable if the driver is so situated that he can not exert the ordinary force to sustain them.

**Trespass on the Case.**—Death from negligence. Appeal from the Circuit Court of St. Clair County; the Hon. ALONZO S. WILDERMAN, Judge, presiding. Heard in this court at the August term, 1895. Reversed and remanded. Opinion filed March 7, 1896.

MESSICK & RHOADS, attorneys for appellant; JOHN W. NOBLE, counsel.

B. H. CANBY and W. J. MOYERS, attorneys for appellee.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The appellee recovered a judgment for \$5,000 damages on a declaration averring in substance that his intestate was killed by the negligence of a motorman of appellant in sounding the gong of his car in such a negligent and unnecessary manner as to frighten a team of horses that was at the time passing along the track beside said car, whereby said team was caused to run away and run into the buggy in which appellee's intestate was at the time riding.

The evidence in brief shows that the deceased, in company with another person, had just passed over the bridge that spans the Mississippi river; that behind him another team, being driven by a young man by the name of Kempf, was also passing over said bridge, from the west to the east, and

as the team had reached about the top of the east approach a street trolley car came up beside the team, going in the same direction, and the motorman sounded the gong, whereupon the team increased its speed, pranced some, one of the horses being in a lope and the other trotting, when the driver in some way fell out on the tongue or double-trees of the wagon, and the horses thus being released of control, ran away and into the buggy of deceased, as above stated. The appellee claims the gong was continued to be sounded after the motorman saw, or might have seen, the horses were frightened. This is denied by appellant. Kempf testified that his team was twelve years old; that he had been driving them into St. Louis on an average of twice or three times a week for three years, and, as understood, over this bridge; that "it was a gentle team; they never got frightened at a street car before;" and had passed street cars on the bridge and approach. He had some furniture loaded in his wagon, and says, "I was sitting on a bureau or little wash-stand. I was standing in the wagon close to the end gate, the front end gate." His feet, as he says, were "on the inside of the wagon, at the front end gate." He says the motorman "rang the bell when he came up close to the wagon." "It made my horses get scared and made them run away. The car got ahead of me after about 100 yards; when it pitched me off the wagon the car was ahead then; I laid on the tongue and held the horses, but I could not hold them." He says, "the horses pulled me over the end gate onto the tongue, then they started running away when they had me on the tongue. When that (car) was aside of me one (horse) was trotting and the other was in a lope."

The watchman of the bridge testified that he saw the horses going too fast, and he started across the bridge to check them, but desisted because the driver got them under control; but that he then jerked them, and as he did so, slid off onto the tongue; that his feet were hanging outside the front end gate when he slid off, and, as he claims, stood on the tongue or doubletrees, trying to hold the horses, but failed to do so; that he did not lose control of them until

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after he had slid off, or onto the tongue. There is other evidence on the respective sides, but this is particularly referred to for the purpose of considering the instructions of the court given to the jury, on which error is assigned.

The court prepared the instructions and told the jury, among other things, that the motorman had the right and it was his duty to sound the gong to give notice of the approach of his car, although the wagon was not on the railway track, and that he had a right to assume such sounding of the gong would not frighten the team.

"8. But while this is so, it was his duty to be watchful so as to exercise ordinary care in the operation of his car, and in running his car to look out and see whether teams are being thereby frightened, so as not to put in danger the person in charge of such team, or other persons who were rightfully and lawfully using the bridge approach, and if he saw, or by the exercise of ordinary care ought to have seen, that a team of horses in front of him on the approach was frightened at the noise of his car, or at the sound of his gong, so as to endanger its driver, or other persons on said approach, then it was his duty to do what he reasonably could in the management of his car to diminish the fright of his team, and if it was necessary to accomplish that purpose, then he should stop the sound of his gong, or even stop the car itself.

"9. You will therefore determine from the evidence whether there was one of defendant's cars there and whether the motorman on defendant's said electric car on the north side of the approach of the bridge across this river at East St. Louis, behind the team of horses being driven by one William Kempf, sounded the gong of his car, and whether the said team became frightened at that noise; also whether said motorman saw, or by the exercise of ordinary care ought to have seen, that said team was being frightened thereby, and whether he continued to sound said gong after he saw, or ought to have seen, said team was so frightened, and whether in consequence thereof said team became unmanageable and ran into the buggy in which the de-

ceased, Burgdorf, was riding, and thereby so injured said Burgdorf that he died, and also whether said motorman in continuing to sound said gong failed to exercise ordinary care for the safety of the driver and said Burgdorf, and whether the injury to Burgdorf was the natural and ordinary consequence of such failure. If you so find, and also find that said Burgdorf was, at the time he was so injured, and immediately before, exercising ordinary care for his own safety, and that he left as next of kin the persons named in the declaration, and that they sustained pecuniary loss by reason of his death, then you should find for the plaintiff."

These instructions are principally criticised as invading the province of the jury in telling them what acts or omissions would constitute negligence, and as limiting the care of the motorman to that particular team. There are also other criticisms.

The instructions were carefully prepared and are evidently based on the language of the opinions in cases of *Benjamin v. H. St. Ry. Co.* and *Ellis v. L. & B. Ry. Co.*, 160 Mass. pp. 3, 341. The eighth instruction tells the jury, as a matter of law, what it was necessary for the motorman to do in this case, with the necessary implication that if he did not do so, then he was guilty of negligence; that is, if he saw the team was frightened, so as to endanger the driver or other person, then, if necessary, he should stop sounding the gong, or even stop the car itself.

In *Penn. Co. v. Frana*, 112 Ill. p. 404, the court instructed the jury that "It is the duty of a person before attempting to cross a railway track, to stop, if necessary, and look and listen for the approach of trains, before entering upon such track." The court say, "It is no doubt true that it is the duty of a person about to cross a railroad track, to approach cautiously, etc., but it is always a question of fact for the jury to determine from the evidence, whether the person injured has exercised proper care and caution, and not a question of law." The instruction was held to be bad. In *Myers v. I. & St. L. Ry. Co.*, 113 Ill. 386, it is said, after re-

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viewing the authorities, "Under the ruling in the cases cited, an instruction which tells the jury, as a matter of law, that certain facts constitute negligence, is erroneous." In the case of *North Chicago St. R. R. Co. v. Williams*, 140 Ill. 275, an instruction was held to be erroneous which told the jury it was negligence to attempt to get on a street car while in motion. In telling the jury, as a matter of law, what the duty of the motorman was, under the facts of this particular case, was, as stated in the *Frana* case, *supra*, an invasion of the province of the jury. To say that, under a certain state of facts, a duty to do a certain thing was imposed by law, is equivalent to saying, if that certain thing is not done then there was negligence. The evidence shows in this case, the car was even, alongside the team, after it came up, and it may be that other conditions existed requiring the sounding of the gong or continuous movement of the car, or that, by going ahead, the car would soon pass the team, which, as is generally known, allays fright. At least under the repeated decisions of our courts, the particular things that should have been done or omitted, in order to exercise proper care, usually are, and were in this case, facts, for the determination of the jury, and not law, for the determination of the court.

The ninth instruction seems to make liability depend upon whether the motorman saw, or might have seen, that the team was frightened by the sound of the gong; from which, considered in connection with the duty imposed by the eighth instruction, the jury might conclude that in such case it was his duty to stop sounding the gong, or stop the car itself, although, being so frightened, the team was at the time under control, if thereafter it became unmanageable and ran away. As stated in the *Ellis* case, *supra*, horses usually become frightened at trolley cars, until carefully trained, and in that case mere fright of horses is not made the ground for imposing the duty suggested, but it is where the fright is such and fear manifested in such a way as to show the motorman that the driver of the horses is in peril. If it is the duty to stop cars, or stop sounding the gong every time



a horse is frightened by the cars, then the use of them would be impracticable. *N. C. St. R. R. Co. v. Harms*, 59 Ill. App. 375. But the law does not imply the driver of the horse is in peril merely because the horse is frightened by the trolley car. On the contrary, in the absence of manifestations other than mere fright, the fair presumption is that the driver will be able to control the horse, for the reason, the duty being imposed by law to give the signal, the driver of the team, going into the presence of such cars, takes the ordinary risk of being able to do so. Of course, if as stated in the Massachusetts cases, the manifestation of fright is such as to show the motorman the driver is in peril, then he should do what he reasonably can to relieve him. It is the duty of the driver to have such ordinary appliances, and be in a reasonably suitable position to control his horses, if frightened. If the horse should be frightened at such cars and run away because of weak and insufficient lines to hold him, it would not be contended the company would be liable, nor would it be if the driver was so situated that he could not exert the ordinary force to restrain him, for the reason, in such cases, the primary negligence would be the driver's. This element is entirely omitted from these instructions. It is especially important, in view of the fact, clearly shown by the evidence, that the team was under control until the driver fell out of the wagon, which, let it be observed, was after the car had passed beyond the team.

Kempf, the driver, says, "When that (car) was aside of me one (horse) was trotting and the other was in a lope." This shows the team was under control and did not indicate the driver was then in peril. "The horses pulled me over the end gate onto the tongue; then they started running away. When it pitched me off the wagon the car was ahead then." He does not explain how he was pulled over the end gate while the horses were still attached to the wagon, and they continued to be attached until after he fell on the bridge and the wagon had struck the buggy in which deceased was riding, which was some distance further on. The defendant's witnesses say his feet were hanging

over the end gate, and when he jerked on the horses he slid down on the tongue. He says his feet were on the inside. However this may be, it is evident, while the horses were attached to the wagon and his feet were inside he could not be pulled out on the tongue by holding to the lines. There is no evidence he was jolted out by the wagon striking an obstruction, nor is there any evidence to show that the mormon could reasonably anticipate he would be placed in such a perilous and helpless position by anything that was occurring.

The judgment is reversed and the cause is remanded.

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### Germania Life Insurance Company v. Elizabeth Koehler.

1. **ERRORS—*What May Be Considered Where the Record Does Not Contain all the Evidence.***—Where the record fails to show that it contains all the evidence the court can not consider errors assigned that the verdict and judgment are not supported by the evidence but may, notwithstanding such omissions, consider errors assigned on the ruling of the court on the admission or rejection of evidence and the giving or refusing of instructions.

2. **INSURANCE—*Waiver of Forfeiture for Breach of Condition.***—The right to declare a forfeiture, under a provision in a policy of life insurance that the assured shall not go into certain prohibited territory without the consent of the company, is waived by the acceptance of payments of the premium from the assured while residing in such territory, and after the fact is known to the authorized agents of the company.

3. **SAME—*Treating a Policy as Valid—Estoppel.***—When a condition of a policy of insurance has been broken by the assured, if the company, with knowledge of the same, continue to treat it as a valid and subsisting contract by the receipt of payments of premiums thereon, the right to insist upon the forfeiture is waived and the company will be estopped from asserting such right.

4. **SAME—*Powers of Agents.***—The public are authorized to deal with an agent of an insurance company upon all subjects within the apparent scope of his authority. An agent, clothed with powers to act for a company at all, is treated as authorized to bind it as to all matters within the scope of his real or apparent authority.

5. **SAME—*Stipulations Concerning Waivers.***—A stipulation in a policy that a waiver of conditions therein could only be made by indorsement

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upon the policy by the general agent, is for the benefit of the company, and may be waived by it.

6. NOTICE—*To an Agent.*—Notice to an agent of matters falling within the general scope of his apparent authority is notice to his principal.

7. ESTOPPEL—*By Notice to the Agent.*—An insurance company may be estopped from asserting a forfeiture of a policy by the knowledge of its agent of facts which would justify it in declaring the forfeiture, which right it has failed to exercise but instead treated the policy as in force.

Assumpsit, on a policy of insurance. Error to the Circuit Court of St. Clair County; the Hon. ALONZO S. WILDERMAN, Judge, presiding. Heard in this court at the August term, 1895. Affirmed. Opinion filed March 7, 1896.

GEO. C. REBHAN and TURNER & HOLDER, attorneys for plaintiff in error, contended that in all cases where the assured has any notice of any limitation upon the agent's power, or where there is anything about the transaction to put him on inquiry as to the actual authority of the agent, acts done by him in excess of his authority are not binding, as where it is generally known that limitations are imposed in certain respects. So, where direct notice, or any notice which the assured as a prudent man is bound to regard, is brought home to the assured, limiting the powers of the agent, he relies upon any act in excess of such limited authority at his peril. That an insurance company has the right to limit the powers of its agent must be conceded, and when it does impose such limitations upon his authority, in a way that no prudent man ought to be mistaken in reference thereto, it is not bound by an act done by its agent in contravention of such notice. Wood on Insurance, 387; Winneshiek Ins. Co. v. Holzgrafe, 53 Ill. 516; Lawrence v. Johnson, 64 Ill. 351; The Hartford Fire Ins. Co. v. Webster, 69 Ill. 392; Porter v. U. S. Life Ins. Co., 35 N. E. Rep. 678 (Mass.); Bacon, Life Insurance, Sec. 424, Ed. 1894; New York Life Ins. Co. v. Fletcher, 117 U. S. 519; Bacon's Benefit Societies and Life Insurance, Edition of 1894, Sec. 158; Lycoming Fire Ins. Co. v. Langley, 63 Md. 196.

If the agent is one with limited authority and not author-

ized, or expressly forbidden, to waive any conditions of the contract, and these instructions and limitations are communicated to the person dealing with such agent, or if by ordinary prudence he could have informed himself of them, the company will not be bound by the agent's acts. *Bacon, Life Ins., Secs. 426, 431, 431a; Kyte v. Assurance Co., 144 Mass. 43; Putnam Tool Co. v. Fitchburg Ins. Co., 145 Mass. 265; Porter v. U. S. Life Ins. Co. (Mass.), 35 N. E. Rep. 678; Miller v. Union Central Life Ins. Co., 110 Ill. 102; The Continental Ins. Co. v. Ruckman, 127 Ill. 364.*

WM. WINKELMANN, attorney for defendant in error.

Notice to an agent of any fact connected with the business in which he is employed, is notice to the principal. *Mullanphy Savings Bank et al. v. Schott et al., 135 Ill. 669.*

It is unconscionable to retain the money received by the company for premiums due upon an insurance policy and contract, which they treat as valid while no risk is imminent, but when they are called upon to perform under the contract, they repudiate all liability and claim a forfeiture. If a party, by his silence, leads another to act, to wit, to pay money in good faith under the belief that the payment is regularly made, such other will not be permitted, after the money has been received, to allege anything to the contrary; for he who will not speak when he should, will not be allowed to speak when he would. *McEwen v. The Montgomery Co. Mut. Ins. Co., 5 Hill 101; Rowley v. Empire Insurance Co., 3 Keyes 559; Anson v. The Winneshiek Insurance Co., 23 Iowa 84.*

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The defendant in error recovered judgment on a life insurance policy, to reverse which, this writ of error is prosecuted. The errors assigned relate to the admission of evidence, the giving and refusing to give instructions, and overruling the motion for a new trial.

The certificate of the clerk to the record shows that it does not contain all the evidence; it specifies a number of

papers that were read in evidence that are not in the record; therefore this court can not consider the error assigned that the verdict and judgment is not supported by the evidence, but notwithstanding such omissions, can consider the errors assigned on the ruling of the court on the admission or rejection of evidence, and the giving or refusing to give instructions. *I. C. R. R. Co. v. O'Keefe*, 154 Ill. 508.

The only error really discussed is that relating to the admission of evidence to show a waiver of the condition of the policy that the assured should not go into certain prohibited territory, and the giving of instructions based thereon. The assured went to, and lived for a time in the State of Texas, without the consent of the company, where he died, which was prohibited by the policy.

The authorized agent of the company received several premiums, and gave receipts therefor, after he knew that the assured had gone to the State of Texas, and stated, when informed of the fact, that it did not make any difference where the assured was. It seems that the agent did not inform the home office of the fact of such change of residence. The receipts that were given contained the following printed matter: "Agents holding an appointment from the company are authorized to receive premiums at or before the time when due, upon the receipt of the president or secretary of the company, but not to make, alter or discharge any contracts, or waive any forfeitures. This receipt is not valid until countersigned by the agent of the company."

The court instructed the jury in effect that if they believed from the evidence a duly authorized agent of the company received such premiums after notice of such change of residence, and the company retained the same, then it "became as much bound as if the premium had been paid directly at the home office in New York, and had been received there with a full knowledge of the change of residence \* \* \* and this regardless whether the agent informed the company of the violation of the policy or not."

The plaintiff in error contends this is not the law. Our Supreme Court is committed to the doctrine that such facts

would constitute a waiver of the right to declare a forfeiture. The Illinois Fire Ins. Co. v. Stanton, 57 Ill. 354; The Williamsburg City Fire Ins. Co. v. Cary, 83 Ill. 453; The N. B. & M. Ins. Co. v. Sterger, 124 Ill. 81; Phenix Ins. Co. v. Hart, 149 Ill. 513, 523. In the latter case the question of the right of a local agent to waive a right to forfeiture was discussed. It is there said, p. 524, "The stipulation in the policy that the waiver could be made only by indorsement upon the policy by the general agent at Chicago, was inserted for the benefit of the insurer, and, like any other clause or condition of the policy, might be waived by the company. As we have seen, notice to the agent of matters falling within the general scope of his apparent authority is notice to the principal and the company may be estopped from asserting a forfeiture of the policy by the knowledge of its agent of facts which would justify it in declaring the forfeiture, which right it has failed to exercise, but instead has treated the policy as in force. \* \* \* Independently of whether the local agent was authorized to waive the indorsement of consent upon the policy, the company being chargeable with notice of the fact that the assured was relying upon the policy as valid insurance and having failed to exercise its right of forfeiture until a cause of action accrued upon the policy, must be held to have waived the necessity of such indorsement of consent. It would be most inequitable to permit the company to insist upon the forfeiture after the fire, when, by its silence and apparent acquiescence in the validity of the policy, the assured had been led to rely thereon and prevented from obtaining other insurance."

In that case it will be observed by reading p. 523, that the company insisted, as here, that as the insured had notice of the stipulation in the policy and of the limitation of the local agent's authority that he could not have been misled by any apparent authority with which the agent was clothed.

Another objection to the instructions is that they assume the payments were made upon terms and conditions. The language thus used is subject to criticism, but it evidently

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refers to the undisputed fact that the agent was informed of the place where the assured was living at the time of such payments, and to the assurance given by the agent that such fact made no difference.

Under the facts as indisputably proven, the defendant in error was entitled to recover, in which case it is not every error that will cause a reversal.

As counsel have not discussed the other assignments of error, we will not do so, or do more than state they have been examined and are not deemed well founded. The judgment is affirmed.

Baltimore & O. S. W. Ry. Co. v. Daniel H. Wheeler.

1. INSTRUCTIONS—*Where the Case is Close*.—Where the case is close on the facts, the jury should be accurately instructed.

2. SAME.—*When a Party Can Not Complain*.—A party is precluded from asserting that the court erred in instructing the jury upon a certain theory, when he has requested instructions upon the same theory himself.

3. RAILROADS—*Kicking Cars Over Public Highways—Failure to Ring Bell, etc.—Negligence*.—Section six of the act in relation to fencing and operating railroads, requiring the ringing of the bell or the sounding of the whistle continuously for eighty rods before a public highway is reached, applies to cases where cars are kicked by an engine across a public highway, and the failure to ring the bell or sound the whistle in such cases is negligence.

4. ORDINARY CARE—*Question of Fact*.—It is a question of fact to be determined by the jury, whether or not, in a particular case, the lack of ordinary care is negligence.

5. WORDS AND PHRASES—"Weight" and "Preponderance".—An instruction which informs the jury that if they believe certain things "from the weight of the evidence," is tantamount to saying "from a preponderance of the evidence."

6. SAME—*Free from Negligence*.—The term, "free from negligence," as used in an instruction, is equivalent to "use of ordinary care."

Trespass on the Case, for killing domestic animals. Appeal from the Circuit Court of Wayne County; the Hon. CARROLL C. BOGES, Judge, presiding. Heard in this court at the August term, 1895. Affirmed. Opinion filed March 7, 1896.

JOHN G. DRENNAN and ANDREW J. LESTER, attorneys for appellant.

HANNA & HANNA, attorneys for appellee.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

Appellant's main track runs nearly parallel with a certain public highway at Mill Shoals, and a side track leads from the main track to the public highway, a distance of about 360 feet, and thence across the public highway to a stave factory, which is about one-fourth of a mile from the main track. On September 1, 1894, appellant's servants, in charge of a freight train, undertook to place two freight cars on the side track near the stave factory, and the engine was made to kick the two cars down the side track. Appellee, with wagon and team, was crossing the track on the public highway, when the two cars detached from the engine, struck and killed the horses and injured the wagon and harness. The bell was not ringing, nor was the whistle sounding, at the time; nor was there given any other warning of the approach of the cars, or of the proximity of the train, save the noise of running and the hallooming of a brakeman on the first of the moving cars, at or just before the time of the collision. The accident occurred at nightfall, and a barn interfered, to some extent, with appellee's view of the track.

A detailed statement of the facts is unnecessary, inasmuch as appellant does not contend that the evidence is insufficient to support the verdict. It is said, however, that this is a close case on the facts, and that, for this reason, the jury should have been accurately instructed. It is then urged that the court erred in certain parts of the charge to the jury.

Appellee's second instruction tells the jury that, if they believe certain things from the *weight* of the evidence, they should find for the plaintiff. The use of the word *weight* instead of *preponderance* is called error. The ordinary man



would not draw a fine distinction between the two words, and especially so when the word preponderance is so used in other instructions as to make it synonymous with the word weight.

The same instruction is criticised for using the clause, "if the plaintiff was free from negligence on his part," instead of the stock expression, "if the plaintiff used ordinary care." It is said that the first of these clauses is satisfied with the passiveness of appellee, while the second would require that he should do something to avoid injury. Let us see. Ordinary care means that one is actively using his faculties (doing something) to apprehend danger and avoid injury. A failure to observe ordinary care is negligence. Therefore, negligence is the failure to use one's faculties (to do anything) to avoid injury. Therefore, to be free from negligence is to use one's faculties (to do something), and does not, by any means, indicate mere passivity on the part of the injured person. There is no merit in the criticism. It is worthy of remark also that other instructions clearly informed the jury that appellee could not recover unless he was in the exercise of ordinary care at the time of the accident.

It is also urged that the right of recovery is predicated upon the failure of appellant to use ordinary care, and that this is treated as negligence *per se*, whereas it is a question to be determined by the jury whether or not in the particular case the lack of ordinary care is negligence. Without discussing this point, it is sufficient to say that the lack of ordinary care mentioned in the instructions, and which is called negligence, is expressly defined as consisting either in running over the crossing at a greater rate of speed than was reasonably safe to persons about to cross the track under the circumstances, or in not ringing the bell, or sounding the whistle, as required by law. When thus defined, the language used could not have misled the jury. Besides, the court gave instructions to the jury, at appellant's request, which conceded that the want of ordinary care on appellant's part was negligence. And shall appellant be permitted to blow hot and cold at the same time?

Another criticism of some of the instructions is, that the liability is predicated upon the negligence of those in charge of the engine, when the engine was in fact detached from the cars at the moment of the collision. So is a bullet detached from the gun at the time of collision with the victim's heart, but the man who pulled the trigger is responsible for the consequences, nevertheless. The brakeman on the moving car is not charged with negligence for not setting the brakes, nor is appellant relieved from liability because the brakeman could not see the team in time to stop the train. Those in charge of the engine, without ringing the bell or sounding the whistle, kicked the cars over the public highway when it was too dark for the brakeman to see appellee's team in time to set the brakes and avoid the collision, or to give sufficient warning of danger, and appellant is liable for the resulting injury to one who was himself in the exercise of ordinary care at the time.

It is also argued that the statute requiring the ringing of the bell, or the sounding of the whistle continuously for eighty rods before a public highway is reached, "refers to trains when being moved with an engine attached." Therefore, this enactment is not applicable to a case in which the servants of the company are sending two cars along the track without an engine.

What is the spirit, what is the object of the law? Is it not that travelers upon the public highway may have notice of the fact that a train is about to cross the public highway, that they may avoid collision—injury—perhaps death? May not the danger to the unwarned be as great when the engine loosens its hold upon the cars, and leaves the forward movement to momentum, as when the engine pushes the cars over the highway? The only difference would be in the rate of speed. In the one case it is like a stone from a sling; in the other, it is like a bludgeon. It is unpleasant to be struck by either.

We have no doubt that the statute under consideration applies to cases where cars are kicked by an engine over a

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public highway, and that the failure to ring the bell or sound the whistle in such cases, is negligence. But the court gave an instruction to the jury, at the request of appellant, which was framed upon the theory of appellant's liability for neglecting the statutory duty of ringing the bell or sounding the whistle. This precludes appellant from asserting now that the court erred in instructing the jury upon this theory.

There are other criticisms of the instructions, which are not of sufficient gravity to require particular notice.

Suffice it to say that the law was stated to the jury with substantial accuracy when the instructions are considered as a series, and that the verdict of the jury is fully justified by the evidence.

The judgment is affirmed.

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**Metropolitan Accident Association v. Jubal Harrison Clifton.**

1. **INSURANCE**—*When the Application is the Act of the Company.*—Where an applicant for insurance informed the company's agent as to certain matters required to be stated in the application, and signed a blank application, which the agent afterward filled out himself, and which was not afterward seen by the applicant until produced by the company on the trial of a suit on the policy, it was held that the application was the act of the company, and that the representations therein were conclusive upon it.

2. **SAME**—*Waiver of Demand in Writing.*—Where the conditions of an insurance required a demand in writing to be made before bringing a suit upon the policy, and the attorney for the insured made a verbal demand upon the company's agent for payment and was refused, with the statement that the insured had committed a fraud on the company, it was held that the objection to the form of the demand was waived.

**Assumpsit**, on an insurance policy. Appeal from the Circuit Court of Union County; the Hon. JOSEPH P. ROBERTS, Judge, presiding. Heard in this court at the August term, 1895. Affirmed. Opinion filed March 7, 1896.

A. NEY SESSIONS and JAMES LINGLE, attorneys for appellant.

DODD & PICKRELL, attorneys for appellee.

MR. PRESIDING JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

This suit was brought by appellee on a policy issued to him by appellant and the verdict returned was for \$67.50 damages, for which sum and costs of suit a judgment was entered. Appellee was insured by this policy in class "A," on the basis of his liability to accident in his occupation of "produce dealer and shipper," which was the occupation represented in his application.

The defense relied on was that plaintiff fraudulently represented his occupation to be that of "produce dealer and shipper" in procuring the policy, when in fact his principal occupation then was that of a junk dealer, which is classed in class "C," and would entitle him to a less amount of indemnity for total disability than if he was insured in class "A;" that plaintiff was not disabled during the month sued for, but was shamming; that no proper proof of the disability sued for was furnished defendant as required by the policy and by-laws; that the court erred in its rulings in admitting and refusing to admit evidence, and in giving, refusing and modifying instructions.

An examination of the record satisfies us that the trial court committed no reversible error either in its rulings touching the evidence or in respect to the instructions given, refused or modified. Twenty-two instructions were given for defendant, and the jury were thereby instructed fully and most favorably in its behalf. The evidence justified the jury in finding that plaintiff was disabled by an accident, and continued in that condition during the month as claimed, and was not shamming.

It was admitted by defendant that plaintiff on June 18th furnished it with written notice stating the time, place, manner and nature of the injury complained of, and the certificate of a surgeon who had examined the same, as provided by the policy. And on September 18, 1893, the day before

this suit was commenced, plaintiff's attorney made a verbal demand on defendant's agent for payment of this claim, and the agent replied: "Your man has committed a fraud on us, and we refuse to pay it;" and thereby waived objection to the form of the demand, but based the refusal to pay solely on the ground of fraud.

The only remaining matter necessary to notice is the complaint that plaintiff fraudulently represented his occupation to be that of "produce dealer and shipper" at the time he applied for the policy. He was called and examined as a witness on behalf of defendant, and, if the jury believed his testimony, he was a dealer in and shipper of produce, as stated in the written application. Furthermore, he testified he fully and truthfully informed defendant's agent as to his occupation and signed a blank application which said agent afterward filled out himself, and which was not seen by plaintiff until produced at the trial.

This being so, the application was the act of defendant and the representations therein were conclusive upon it. *Andes Ins. Co. v. Fish*, 71 Ill. 620; *Germania Fire Ins. Co. v. Hick*, 125 Ill. 361; *Phoenix Ins. Co. v. Stocks*, 149 Ill. 619.

No reason appears why the judgment should be reversed, and it is therefore affirmed.

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### Mary S. Barbee v. Lizzie B. LeCrone et al.

1. *PRACTICE—Execution, When Properly Quashed.*—When one of three co-sureties pays his proportionate part of a judgment, the others pay the balance by giving their joint note for the same, and the sheriff returns the execution issued thereon satisfied in full, the co-sureties can not afterward have the return changed so as to show a different state of facts, and any subsequent execution issued thereon is properly quashed.

*Motion to Quash an Execution.*—Error to the Circuit Court of Effingham County; the Hon. SILAS Z. LANDES, Judge, presiding. Heard in this court at the August term, 1895. Affirmed. Opinion filed March 7, 1896.

WRIGHT BROTHERS, attorneys for plaintiff in error.

B. F. KAGAY and R. C. HARRAH, attorneys for defendants in error.

Courts of general jurisdiction have an inherent supervisory power over their process, and may quash, stay or set aside an execution, whenever it is necessary to prevent or correct abuse thereof, according to the justice and equity of each particular case. 7 Am. & Eng. Enc. Law, 146; Sandburg v. Papineau, 81 Ill. 446.

A court from which an execution issues after the satisfaction of the judgment should, on motion, set aside the execution and sale under it. Russell v. Hugunin, 1 Scam. 562.

The acceptance of a promissory note is *prima facie* satisfaction of the antecedent debt for which it is given. McConnell et al. v. Stettinius, 2 Gilm. 707; Ralston v. Wood, 15 Ill. 156; Smalley v. Eddy, 19 Ill. 207; Morrison v. Smith, 81 Ill. 221.

MR. PRESIDING JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

On December 15, 1892, Mary S. Barbee took judgment on a note against A. W. Le Crone, Lizzie B. Le Crone, John Le Crone and George M. Le Crone. On July 17, 1893, an execution was issued on this judgment and served on all the defendants except A. W. Le Crone, who was then dead. Lizzie B. Le Crone paid, and Mary S. Barbee received the one-third part of the judgment, and Lizzie B. Le Crone caused notice to be served on the attorney of Mary S. Barbee and the sheriff, on July 17, 1893, offering to turn out property of George and John Le Crone to satisfy the balance due on said execution, and forbid levy on her property until the property of said George and John Le Crone was first exhausted. After this notice was served, they paid said balance due, by giving their joint note, which has since been paid and the judgment and execution fully satisfied, and the latter returned by the sheriff, "Satisfied in full" Dec. 7, 1893, after the writ had expired. This return was seen by Bowling, who was locking up the title of Mrs.

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Le Crone, who had applied for a loan, and had obtained it on her property on the date last named. After that the return was changed at the instance of the attorney of John and George Le Crone so as to read, "I return the within writ by order of W. B. Wright, assignee of Mary S. Barbee, plaintiff."

On March 11, 1895, the execution in question was issued under the same judgment, and on March 13, 1895, Lizzie B. Le Crone filed her motion to quash said execution, for the reason among others, that she had as co-surety paid her proportionate part, and said John and George Le Crone had paid their proportionate part of said judgment to said plaintiff, and the execution first issued thereon was indorsed satisfied. That the execution dated March 11, 1895, was served on her only, by the sheriff, who threatens to levy upon her property for the benefit of John and George M. Le Crone, co-sureties with her for A. W. Le Crone, the principal maker of the note on which said judgment was taken. Hearing of this motion was had by the court. The motion was sustained and the execution quashed. A careful examination of the record satisfies us that the evidence justified the court in finding the material allegations of the motion were proven, that the judgment had been fully paid to Mary S. Barbee, as alleged, and that Lizzie B. Le Crone, John Le Crone and George M. Le Crone were co-sureties for A. W. Le Crone, and she was not a principal maker of said note, nor did she execute the same to secure said John and George M. Le Crone from loss as they contend, and she is in no manner liable to refund to them the proportionate part of the judgment paid by them. The motion was properly sustained and the judgment is affirmed.

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City of Newton v. Joseph Bergbower.

1. CITIES AND VILLAGES—*Mayor Can Not Remit Fines.*—The power given by section 9, article 2, chapter 24, R. S., entitled "Cities, Villages and Towns," to release any person imprisoned for a violation of an ordi-

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nance, does not authorize him to release the judgment under which such imprisonment was had.

Debt, for the violation of an ordinance. Appeal from the County Court of Jasper County; the Hon. H. M. KASSERMAN, Judge, presiding. Heard in this court at the August term, 1895. Reversed and remanded. Opinion filed March 7, 1896.

THOMAS J. FITHIAN, city attorney, for appellant.

No appearance by appellee.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The appellee was fined for the violation of an ordinance of appellant, in the sum of \$25, from which judgment each party took an appeal—the appellee to the Circuit Court and appellant to the County Court of Jasper County. The appellee did not perfect his appeal, but appellant did, and the transcript of the proceedings was duly filed in County Court. Thereafter, the record does not show when, the following entry was made on the justice's docket in said case:

"I, T. R. Baker, Mayor *pro tem.* of the city of Newton, hereby remit the above penalty."

An additional transcript was filed in the County Court, showing such entry, and thereupon appellee's counsel made a motion to dismiss the appeal on the following grounds: 1, the penalty imposed by the judgment was remitted; 2, the appellee had first prayed an appeal and had therefore the right to choose the court to which the appeal should go; 3, there was no judgment from which an appeal could be taken. The court sustained the motion and dismissed the appeal; thereupon the city attorney was authorized to bring the case to this court.

The judgment, as entered on the justice docket, was in due form, and appellee did not perfect the appeal he prayed, therefore there is nothing in the second and third grounds. The mayor had no power to remit the judgment, and therefore an appeal could be taken from it. The appeal, however, was taken and the transcript filed, evidently, before the attempt to remit the penalty was made, which filing of



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the transcript perfected the appeal. The power given by Sec. 9, Art. 2, part 1, of Incorporation Act, to the mayor, is to *release* any person *imprisoned* for the violation of any city ordinance. This does not include the power to release the judgment under which such imprisonment may be made.

The appellee filed no briefs, and we might have reversed and remanded the case under our rules *pro forma*, but in order to settle the questions here raised, deemed it best to decide the points made. The judgment is reversed and the cause remanded.

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**Morris Emmerson and Charles Burnett v. Johnson  
Hutchinson.**

1. *DECEIT—Basis of the Action for.*—Indefinite statements, expressions of opinion, conjectural views of cost of the erection of a building, expense or value, can not be made the basis of an action for deceit. One who relies upon such statements, etc., does so at his peril and must take the consequences of his own imprudence.

2. *SAME—Proof of Conspiracy Necessary.*—An action for deceit based upon a conspiracy of two persons can not be sustained upon proof implicating but one of the parties.

**Action for Deceit.**—Appeal from the Circuit Court of Jefferson County: the Hon. EDMUND D. YOUNGBLOOD, Judge, presiding. Heard in this court at the August term, 1895. Reversed. Opinion filed March 7, 1896.

C. H. PATTON and NORMAN H. MOSS, attorneys for appellants, contended that the instructions given for plaintiff omit the qualification always necessary to constitute the actual fraud charged in the declaration, that the representations were known to be false. This omission renders these instructions utterly bad and misleading. *Sims v. Klein*, Breese, 234, 302; *Mitchell v. Deeds*, 49 Ill. 416; *Walker v. Hough*, 59 Ill. 378; *Weatherford v. Fishback*, 3 Scam. 170; *Tone v. Wilson*, 81 Ill. 529; *Clement v. Boone*, 5 Ill. App.

111; McDaniel v. Bryan, 8 Ill. App. 299; Sherbourne v. Tobey Fur. Co., 19 Ill. App. 615; Knight v. Gaultuley, 23 Ill. App. 378; Ward v. Lennen, 25 Ill. App. 164; Schwabacker v. Riddle, 99 Ill. 343; Holden v. Ayer, 110 Ill. 453; Wheeler v. Randall, 48 Ill. 182; Hiner v. Rechter, 51 Ill. 249; Merwin v. Arbuckle, 81 Ill. 501; Linington v. Strong, 111 Ill. 160; White v. Watkins, 23 Ill. 480; Allen v. Hart, 72 Ill. 104; Fountleroy v. Wilcox, 80 Ill. 477; St. L. & S. E. Ry. v. Rice, 85 Ill. 406; Wharf v. Roberts, 88 Ill. 426.

Where the evidence is conflicting the instructions must be accurate. Error in this regard is not cured by other good instructions in the series or for opposite party. The jury in no case should be left to choose between conflicting instructions. It is impossible for the court to determine which rule they follow. *C., M. & St. P. Ry. v. Mason*, 27 Ill. App. 455, citing *Hoge v. The People*, 117 Ill. 35. See also *Brownlee v. Alexis*, 39 Ill. App. 142; *L. S. & M. S. Ry. v. May*, 33 Ill. App. 367; *Hulloway v. Johnson*, 129 Ill. 369; *Craig v. Miller*, 133 Ill. 307; *T., St. L. & K. C. R. R. v. Cline*, 135 Ill. 48; *S. & L. Co. v. Kankakee*, 128 Ill. 177; *Elgin v. McCollum*, 23 Ill. App. 186; *Fernandes v. McGinnis*, 25 Ill. App. 165; *Dempsey v. Bowen*, 25 Ill. App. 192; *Wilbert v. Stafford*, 25 Ill. App. 218; *Star & Crescent Mill Co. v. Thomas*, 27 Ill. App. 137; *C. & W. I. R. R. v. White*, 26 Ill. App. 586; *Parnlee v. Farro*, 22 Ill. App. 467; *C., B. & Q. R. R. Co. v. Flint*, 22 Ill. App. 502; *L. S. & M. S. R. R. Co. v. Elson*, 15 Ill. App. 83; *Kraus v. Thileau*, 15 Ill. App. 482; *Brown v. Monson*, 51 Ill. App. 488; *Smith v. The People*, 142 Ill. 117; *Eller v. The People*, 153 Ill. 344.

ALBERT WATSON and G. B. LEONARD, attorneys for appellee.

A person induced to enter a contract by fraud is not bound by it, but may abandon the contract and sue for his damages. Addison on Torts, 1004; 1 Chitty's Pl. 137, note 4; Hilliard on Torts, Secs. 4, 5 and 12; Ward v. Wiman, 17 Wend. 193; Eams v. Morgan, 37 Ill. 260.

What is a willful misrepresentation is correctly explained

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in the instructions to be where a person recklessly makes a false representation of the truth of a material matter of which he knows nothing, or had no apparently good reason for believing to be true. There is no authority contradicting the position here taken by the court, but all the books upon this point say that such a statement, so made and acted upon by another, is a willful false statement, and that it will not lie in the mouth of the author to say he did not know he was making a false statement. In other words, in such case the law makes him know it, and he is estopped to deny it. Cooley on Torts, 300, 474; Bebee v. Knapp, 28 Mich. 53, 76; Litchfield v. Hutchinson, 117 Mass. 195; Ind., P. & C. Railroad Co. v. Gyng, 63 N. Y. 653; Eams v. Morgan, 37 Ill. 260; McKowen v. Furgurson, 47 Ia. 636; Smith v. State, 55 Miss. 513; Beasley v. The State, 59 Ala. 20; Borders v. Cattleman, 42 Ill. 103; Bigelow on the Law of Fraud, 410; Thompson v. Lee, 31 Ala. 292; Hicks v. Stevens, 121 Ill. 196; Penn. R. R. Co. v. Ogden, 35 Pa. St. 72; Gordon v. Grand Street Railroad Co., 40 Barb. 550; Ert v. Henderson River Railroad Co., 35 N. Y. 28; Wabash v. Hall, 66 N. C. 233; Oswald v. McGehee, 28 Miss. 340; McClellan v. Scott, 21 Wis. 81; Starkweather v. Benjamin, 32 Mich. 305; Kendal v. Wilson, 41 Vt. 567; Pierce v. Wilson, 34 Ala. 603.

Proof of the falsity of the facts misrepresented is sufficient proof that appellants knew them to be false. Cooley on Torts, 583; Morse v. Dearborn, 109 Mass. 593; Ruff v. Farrett, 94 Ill. 479.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

This action for deceit was based upon the following declaration given in substance :

That the defendant Morris Emmerson, on the 6th day of June, 1892, desired to bargain with the plaintiff (Hutchinson) and Charles Burnett, to furnish all materials and erect a brick house for Emmerson on his premises in Mt. Vernon. And the plaintiff being a man of no education and wholly unable to estimate the cost or amount of materials necessary

for said building, all which facts the defendant then knew, the defendants, to induce the plaintiff, jointly with said Burnett, to enter into a contract with the defendant Emmerson to construct said building for a much less price than the same was worth, represented to the plaintiff that they had then lately been to the city of Evansville, in the State of Indiana, to learn and had then and there learned the cost of the necessary material therefor, and such cost then being unknown to the plaintiff, and was by the defendants fraudulently represented to the plaintiff as being less than it in fact was, combined and confederated together then and there to deceive and cheat the plaintiff, willfully, falsely and fraudulently estimated the cost and amount of material necessary for said building for and to the plaintiff, and falsely and fraudulently represented to him that said building could be constructed according to the plans and specifications therefor for the sum of \$2,850 and give a profit of \$200 to the builders, which representation the said defendants then and there knew to be untrue; and the plaintiff then and there having no knowledge of the probable or approximate cost of said building, and then and there relying wholly upon the said false and fraudulent estimate, representations and statements of the defendants, as they then well knew, as to what it would cost to procure the necessary materials and construct said building, the plaintiff then and there with said Burnett jointly contracted in writing to construct said house according to the plans and specifications for the sum of \$2,850, whereas in truth the said building could not be constructed for less than \$3,600, as the defendants well knew; and by reason of the false and fraudulent estimate and representation the plaintiff was deceived, and thereby induced to, jointly with said Burnett, enter into said contract, and they erected said building according to the contract, the plaintiff paying therefor, whereby the plaintiff was, by means of the premises, deceived, and compelled to and did expend a large sum, to wit, \$3,600, in the erection of said building, to his damage \$1,000.

On trial before a jury a verdict was returned against ap-

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pellants for the sum of \$700, which was sustained by the court and from which this appeal was taken.

The principal error assigned is that the evidence does not support the judgment.

The case is somewhat peculiar and therefore the entire evidence was read by the court.

The gist of the charge is that Emmerson conspired with Burnett, Hutchinson's partner, to deceive Hutchinson by willfully making false representations as to the cost of the material for the building. If they did not conspire there could be no recovery. If Burnett did not practice deceit on Hutchinson, and join with Emmerson in doing so, then under the evidence this judgment can not be sustained. If Burnett thought he was telling the truth, speaking honestly, in estimating the cost of the building, then it can not be said under this evidence that Emmerson was misrepresenting the facts. The bare facts of this case, as disclosed by the evidence, are that Emmerson desired to construct a brick building on the site where he had another building and that Burnett made the plans and specifications for the same; that he and Burnett went to the city of Evansville to see about the cost of certain wood work that would enter into its construction. There is no pretense they went there to see about the cost of the brick work. They got certain prices for certain classes of material. Thereafter Burnett and a man by the name of Webber, after estimating the cost, went to see Emmerson and offered to construct the building for \$2,850, and the material of the old building, which was estimated to be worth \$200. Webber was not a man of financial responsibility and a bond was required, which not being given, nothing was done. Thereafter Burnett saw Hutchinson, who was in the business of making brick, and had constructed some brick buildings. He and Hutchinson, after talking the matter over, made the same proposition to Emmerson that had been made by him and Webber, and they entered into a written contract to construct the building according to the plans and specifications which Burnett had drawn up. Hutchinson had seen the

plans and, as the weight of the evidence shows, the plans were in the possession of the firm at least a day before the contract was signed. There is no question but that Hutchinson had every opportunity to make or have made a correct estimate of the cost of the building, as near as that could be done by any one. In view of these facts, what right had he to rely upon the estimated cost or amount of material as made by Emmerson? There was no trust or confidential relation existing between them. They were dealing with each other at arm's length, representing respectively the opposite sides of a negotiation that preceded the contract. Naturally each one was trying to get as good a contract as could fairly be obtained, each supposed to know his own business, neither one having information that he was bound to disclose to the other, as all facts were equally open to both.

It has been repeatedly held in such cases that the law will not relieve one from his own want of ordinary prudence. *Eames v. Morgan*, 37 Ill. 260; *Schwabacker v. Riddle*, 99 Ill. 343; *Hicks v. Stevens*, 121 Ill. 194; *Ward v. Luneau*, 25 Ill. App. 164; *Noetting v. Wright*, 72 Ill. 390.

What was the character of the representation alleged to have been made? Appellee claims they represented they had obtained prices of material at Evansville and that the building could be constructed for \$2,600, or \$2,650 at the outside, leaving a profit of \$200. He says he supposed they had figured the cost carefully, knew what they were talking about, and relying on them, entered into the contract. Appellee knew the amount stated was but an estimate, based doubtless on some calculation, yet still only an estimate. He knew no one could accurately determine the cost in advance. Experienced builders differ in their bids on such jobs, often as much as from \$300 to \$500; material-men vary widely in their bids, proportionately, as every man of experience knows. Appellee had been a brick maker for forty years and had constructed some buildings. He knew, evidently, that men varied greatly in their estimates of the cost of the construction of buildings, and therefore must

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have known, as far as Emmerson was concerned, at least, if there was no confederation, that his estimate would naturally be low and that it was largely a matter of opinion, based upon data equally accessible to both, and with which appellee was more familiar and experienced, as Emmerson was a printer, and states he could not figure the amount of brick that would be required.

Indefinite statements, expressions of opinion, conjectural views of cost, expense or value, can not be made the basis of an action for deceit. *Noetting v. Wright*, 72 Ill. 390; *Dillman v. Nadlehoffer*, 119 Ill. 575; *Wait's Actions and Defenses*, 3 Vol. 435. One who relies upon them does so at his peril and must take the consequences of his own imprudence. *Willing v. Schiller*, 27 Ill. App. 286. The estimate of the cost of construction by Emmerson was more a matter of conjecture than the statement of the cost of a farm or what it could be sold for, and yet it has been frequently held such statements by the vendor of land can not be made the basis of an action for deceit. *Dillman case, supra*.

As before stated, the only ground of action is the alleged confederation between Emmerson and Burnett to deceive and mislead Hutchinson. The two latter were in confidential relations, and Hutchinson might well rely on Burnett's statements. If the latter and Emmerson conspired to and did deceive and defraud Hutchinson, an action would lie. But what is the evidence of such conspiracy? Burnett was one of appellee's principal witnesses, and he states that he told the truth. He states: "Q. I will ask you now if the material that went into this building didn't cost more than you and Mr. Emmerson represented to Mr. Hutchinson that it would cost? A. Yes, sir. Q. Considerable more? A. Yes, sir. Q. How long have you been in the building business? A. About fifteen years." After stating that he got prices for material at Evansville, but did not purchase it there: "Q. Did you tell Mr. Hutchinson anything but the truth about your figures? A. No, sir; I told him the truth clear through. Q. Did Mr. Emmerson tell him the

truth? A. Yes, sir. Q. You honestly believed that at the time? A. Yes, sir; I did. Q. That was your honest judgment from the information you got about the cost of this and that material over there? A. Yes, sir. Q. It was only a question of judgment between you as to the material? A. Yes, sir. Q. And anybody else figuring on it would have their judgment about it? A. Yes, sir." There is not a scintilla of evidence to show a conspiracy between Emmerson and Burnett to misrepresent the facts. There is nothing to indicate that Burnett would be in any way remunerated by Emmerson for so doing. No suggestion was made by Emmerson to Burnett to see Hutchinson and get him into the contract. Hutchinson was anxious to get the job—Burnett's statement of the facts in that regard are not denied. He says: "Q. How did he (Hutchinson) happen to go up there with you? A. One Sunday night I went down to the brick kiln, and he had gone out to Walnut Hill, or some place out there; I saw his son, and he said his father would not be home until Sunday night; Sunday night he came, and came over to my house, I think after I had gone to bed. \* \* \* I told him I believed I had a chance to get a job building, brick work, carpenter work and all. I talked to him about the matter in general. On Monday morning he came over, and we both went up to Mr. Emmerson's office."

The theory of appellee was that he was to have nine dollars per thousand for his brick laid in the walls, and as more brick was required than estimated, or was represented to him it would take, he feels injured.

The contract did not provide he was to have any certain price for his work or his brick. The contract was for a completed building for a certain consideration. He certainly could have computed nearly the number of brick that would be required and the expense of laying them, or could have had it done, while Burnett, his partner, could estimate the cost of the other material and work, only approximately, however. Burnett, being a carpenter and house builder, the purchase of material, other than the brick,



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seems to have been left to him. He did not purchase at Evansville, where he had obtained prices, but at Mt. Vernon, where he had to pay more. How much more the evidence does not disclose. The difference may have been the contemplated profits. Emmerson had nothing to do with the purchase of the material, or with the management of the construction of the building, which, there is evidence tending to show, was not economical.

This judgment can not be sustained. It is therefore reversed without remanding.

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### Henry A. Blanck v. E. A. Medley.

1. *CONFESSION OF JUDGMENT—Before Maturity of the Debt.*—The confession of a judgment before the debt is due, may be authorized by a proper warrant of attorney.

2. *SAME—When Attorneys May Act Under a Warrant.*—When a warrant of attorney expressly authorizes any attorney of any court of record to appear for the maker of a note and confess judgment, the fact that an attorney is a member of a firm of practicing attorneys does not prevent him from exercising the power conferred by the warrant in his individual capacity. In such cases it is immaterial what attorney signs the cognovit so that the confession is within the scope of the power.

3. *SAME—The Question of Attorney Fees.*—The question of attorney fees can not be raised by the maker of the notes upon which the confession is had.

**Confession of Judgment, etc.** Error to the Circuit Court of Clay County; the Hon. EDMUND D. YOUNGBLOOD, Judge, presiding. Heard in this court at the August term, 1895. Affirmed. Opinion filed March 7, 1896.

VAN HOOREBEKE, FORD & LOUDEN, attorneys for plaintiff in error.

T. E. MERRITT and L. M. KAGY, attorneys for defendant in error.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

On the 8th day of June, 1893, the defendant in error executed and delivered to plaintiff in error certain judgment notes, none of which were by their terms due until several months thereafter, on which notes judgment was taken by confession on the 10th day of June, 1893, for \$1,540, under the following form of a warrant of attorney: "And to secure the payment of said money we hereby authorize any attorney of any court of record to appear for us in such court, in term time or vacation, at any time hereafter, and confess judgment in favor of the holder of this note for such amount as may appear to be unpaid thereon, together with costs and ten dollars attorney fees."

The declaration was signed by B. D. Monroe and the cognovit of L. D. Thompson, who were, at the time, partners in the practice of law. The declaration did not specifically count for attorney fees, but the cognovit did, and \$40 attorney fees were included in the judgment, the amount specified in the different warrants.

Motion was made to set aside the judgment. The court gave defendant leave to plead, but allowed the judgment to stand. The case was tried by the court without a jury, which found for the plaintiff, thus sustaining the judgment taken by confession. The plaintiff in error raises here two questions of fact and two questions of law. Of fact, that the notes were obtained by misrepresentation, and that they were given without consideration in whole or in part. Of law, that the same firm of attorneys can not, as individual members, represent both the plaintiff and defendant in taking judgment by confession, and that an attorney fee, authorized by the warrant of attorney, can not be included in the judgment confessed, unless specifically averred in the declaration.

The misrepresentation claimed is that the payee agreed to give the maker time, as expressed in the notes, within which to pay them, and after obtaining the notes, took judgment on them before that time expired. The power or warrant of attorney expressly authorized this to be done,

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which has been frequently sustained by the courts of this State. The evidence shows Blanck knew the kind of notes he was signing; that they were judgment notes. There is no evidence that he was misled into signing judgment notes, instead of plain notes. In this respect this case is entirely different from that of *Kingman & Co. v. Reinemer & Co.*, decided by this court at the last term.

We have examined the evidence carefully as to the consideration of these notes and find that it sustains the holding of the court below. It would be useless to review the evidence in this opinion. There was some conflict in the testimony on this matter, but it was for the judge before whom the case was tried to reconcile it and determine the credibility of witnesses. The finding by the judge is entitled to as much respect in this court as the finding of a jury. The judgment is sustained by the facts.

The questions of law were also properly decided. The warrant of attorney expressly authorized "*any* attorney" of any court of record to appear for the maker of the notes and confess judgment. It is not denied that L. D. Thompson is an attorney of a court of record. The fact that he was in partnership with Judge Monroe in the practice of law did not prevent him from exercising the power expressly conferred by the warrant in his individual capacity. It was not necessary to the legality of the proceedings that the firm name should be signed either to the declaration or the cognovit. The name of either was sufficient. As is well known, the signing of the cognovit by an attorney is largely a matter of form, both the declaration and cognovit being usually prepared by the plaintiff's attorney. The cognovit must be authorized by the warrant of attorney in order to sustain the judgment; so that, practically, it is not so material what attorney signs as it is material the confession is within the scope of the power.

The judgment was not erroneous because the declaration did not count for the attorney fee named in the warrants. In *Russell v. Lillja*, 90 Ill. 330, it is held not to be essential to the validity of the judgment in confession to file a

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declaration, although it is the usual practice to do so. "In this, such a case differs from an ordinary action."

It is said in *Campbell v. Goddard*, 17 Ill. App. 382: "Even if the declaration was defective or failed to properly aver that the attorney's fee was claimed by plaintiff, \* \* \* yet, unless it should also be held that upon equitable grounds it can not be allowed, the motion was properly overruled. Certainly the appellants can not be allowed to say that it is inequitable to hold them to the plain provisions of their contract."

It is said also, as to the attorney's fee, that it was unauthorized, as the debtor was insolvent and such a debt was not *bona fide* due, and the case of *Hulse et al. v. Mershon et al.*, 125 Ill. 52, is cited in support of this position. It is sufficient to say that question can not be raised by this plaintiff in error—the maker of the notes. In the case cited it was raised by a creditor of the maker of the notes, by bill in chancery. The creditors are not here complaining. This case falls more nearly within that of *Weigley v. Matson*, 125 Ill. 64, wherein the confession of judgment on notes which included attorney fees was sustained.

There being no error in the record the judgment is affirmed.

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### **Schulenburg & Boeckler Lumber Company v. City of East St. Louis.**

1. **CITIES AND VILLAGES—When Not Liable in Trover.**—A city is not liable in trover to the holder of its warrants, issued without authority, and to pay a debt which it could not legally contract by reason of the constitutional inhibition, because its treasurer, having collected a tax pledged to the payment of such warrants, has diverted it to other purposes.

2. **SAME—Holder of Warrants—Remedy.**—When a person accepts the warrants of a city for material furnished, and looks to the treasurer for their payment out of certain taxes, and discharges the city from further liability, if the treasurer diverts the money arising from the collection of such taxes to other purposes, the remedy of the holder of the

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warrants is against the treasurer and his sureties, and not against the city.

3. *SAME—Constitutional Limit—Indebtedness.*—Where a city has issued evidences of indebtedness against it, after having reached the constitutional limit, in violation of the constitution and the law, such evidences are void and a tax levied to pay the same is illegal.

4. *MUNICIPAL INDEBTEDNESS—Who Bound to take Notice of.*—A party dealing with a municipal corporation is bound to ascertain at his peril whether the municipality has not already reached its constitutional limit of indebtedness, and if he does not, and the limit has been reached, he can not enforce the evidences given to secure him.

**TROVER.**—Appeal from the Circuit Court of St. Clair County; the Hon. ALONZO S. WILDERMAN, Judge, presiding. Heard in this court at the August term, 1895. Affirmed. Opinion filed March 7, 1896.

FRANKLIN A. MCCONAUGHY and GEORGE C. REBHAN, attorneys for appellant, and with them Mr. RUDOLPH SCHULENBURG.

W. H. BENNETT, city attorney, for appellee; B. H. CANBY, of counsel.

MR. PRESIDING JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

This was a suit in trover brought by appellant against appellee to recover the amount evidenced by two warrants issued by the city in payment for certain lumber it had bought of appellant in 1884. One warrant was for \$2,190.40, dated March 5, 1894, payable from the taxes of 1883, appropriated and levied for the engineer fund when collected by the city treasurer. The other warrant is dated April 26, 1884, for \$2,396.10, payable in like manner. By the terms of each warrant, the taxes to be collected for this fund are especially set apart and pledged to the payment of the respective amounts of said warrants. The amount of taxes appropriated and levied for the engineer fund was paid over to the city treasurer, J. M. Sullivan, in 1884, but no demand was ever made on him, by or on behalf of appellant, for the payment of these warrants, or either of them. The cause was tried by the court by agreement, the finding

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and judgment were for defendant, and plaintiff took this appeal. The theory of appellant is that the city was guilty of a tort, because the warrants having been drawn against a fund specially set apart and pledged to the payment of them, and the taxes having been collected for such fund and paid to the city treasurer from the tax of 1883, and the warrants not having been paid therefrom, and said fund having been used to pay other expenses of the city, and being no longer in the treasury therefore there has been a conversion of the money by the city and it is guilty of the trover as charged. This contention is not warranted by the facts and the law applicable thereto. The city, at the time it purchased the lumber, and issued the warrants, in 1884, and for more than a year prior thereto, had been and was indebted in excess of the limit imposed by Sec. 12 of Article 9 of the Constitution. Where a city has issued evidences of indebtedness against it after having reached the constitutional limit, in violation of the constitution and the law, such evidences are void and a tax levied to pay the same is illegal and can not be collected. A party loaning a city money is bound to ascertain at his peril whether the city has not already reached its limit, and if he does not, and the city has reached its limit, he can not enforce payment of such evidences given him to secure the loan. When the city has reached its constitutional limit of indebtedness, the following qualifications apply to further appropriations: First, the tax appropriated must, at the time, be actually levied; and second, by the legal effect of the contract between the corporation and the individual made at the time of the appropriation and issuing and accepting an order on the treasury for its payment when the taxes are collected, it must operate to prevent any liability on the contract against the corporation. *Law et al. v. People*, 87 Ill. 385; *City of Springfield v. Edwards*, 84 Ill. 626.

Appellant, however, took the warrants before mentioned in full payment for the lumber, and by these warrants the city agreed with appellant that it had levied a tax then being collected, and that it thereby pledged and set apart the

tax appropriated to the engineer fund to the payment of the warrants, and agreed that that tax, when collected, should be paid to the plaintiff for these warrants by the treasurer. It is not claimed that the city became indebted by reason of, or that a recovery could be maintained in a suit upon, these warrants; but it is said the treasurer collected that tax, and diverted it from the purpose from which it was pledged by the warrants, and paid it out for other municipal purposes, and for such violation of the contract the city became liable in an action of trover to pay a debt which it could not contract by reason of the constitutional provision at the time the warrants were issued. If such is held to be the law, an easy method is furnished to do the mischief which the constitutional inhibition was designed to prevent. For any failure of the proper officers to collect and pay off taxes in accordance with the appropriations, the remedy must be against the officer, and not against the corporation. *City of Springfield v. Edwards, supra*; *East St. Louis v. Flannigan*, 26 Ill. App. 449. And a municipal corporation is not liable in tort, when the alleged tort arises from a breach of the contract, which is void by prohibition of the constitution. *Prince v. City of Quincy*, 28 Ill. App. 490. In *Prince v. City of Quincy*, 128 Ill. 443, it was held that, although the action was in case, and the ground for recovery was an alleged tort for the refusal of the council to pay any indebtedness contracted directly in the face of the constitutional prohibition, and sought to recover as damages the size and amount of that indebtedness, "that the contract for credit voluntarily made without fraud on the part of the council, or ignorance of any material fact on the part of the appellant, estops him to charge that the failure to pay, or make provision for payment, was a wrong," and it is said also, it is sought by his action to avoid the decision in the cases of *Prince v. City of Quincy*, 105 Ill. 138, 215.

We hold in this case the appellant accepted the warrants, and the city incurred no indebtedness by reason of them, but appellant looked for payment at the hands of the treasurer,

out of the tax mentioned, and discharged the city from all further liability for the lumber furnished; that the remedy of appellant is not against the city, but against the said treasurer and his sureties, and that the finding and judgment of the trial court for the defendant is justified by the facts, and is in accordance with the law. The judgment is affirmed.

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### H. W. Pemberton v. The People, for use of Lizzie Pyle.

1. **APPEALS**—*In Bastardy Cases*.—An appeal in a conviction for bastardy goes directly from the County Court to the Appellate Court.

**Proceedings in Bastardy**.—Error to the Circuit Court of Saline County; the Hon. ALONZO K. VICKERS, Judge, presiding. Heard in this court at the August term, 1895. Affirmed. Opinion filed March 7, 1896.

R. W. S. WHEATLEY, attorney for plaintiff in error.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The plaintiff in error was tried and convicted in the County Court under the bastardy act, from which judgment he appealed to the Circuit Court, where the appeal was dismissed for want of jurisdiction, under a holding that the appeal should have been taken directly from the County Court to this court.

The plaintiff relies upon the decision of the Supreme Court in the case of *Stivers v. People*, reported in Vol. 38, p. 512 of N. E. Reporter, wherein it was held an appeal did lie to the Circuit Court, thus reversing this court in its holding in that case that the appeal provided by statute was from the County Court to the Appellate Court. See *Stivers v. People*, 47 Ill. App. 511. The decision of the Supreme Court in *Stivers' case*, however, was not final, and the opinion does not appear in the Illinois reports, that court having reconsidered its holding and returned to its original view, as expressed in *Lee v. People*, 140 Ill. 536, as see *Lynn v.*



## Karr Supply Co. v. Kroenig.

Lynn, Ill. 160-307, and Gries v. Cable, not yet reported. In the Lynn case it is said in substance that when Sec. 88 of the Practice act, and Sec. 8 of the Appellate Court act, are construed together, as they must be, "the Appellate Court is clothed with jurisdiction of appeals or writs of error from final judgments or decrees of the Circuit Courts, the Superior Courts of Cook County, County Courts and from the City Courts in all criminal cases below the grade of felony, and all suits and proceedings at law or in chancery, except in cases where a franchise or freehold or the validity of a statute, or construction of the constitution is involved, and the excepted cases are required to go directly to the Supreme Court. In the Gries case it is held that an appeal lies from the County to the Circuit Court in a case involving a claim against an estate and probably in other proceedings of minor importance. These decisions are conclusive of the question here involved and the judgment of the court below dismissing the appeal is affirmed.

## Karr Supply Company v. Joseph Kroenig.

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1. VERDICTS—*When Conclusive.*—In actions for damages resulting from personal injuries, when the questions of negligence and of ordinary care are fairly presented to the jury, under the instructions of the court, their verdict is conclusive.

**Trespass on the Case**, for personal injuries. Appeal from the Circuit Court of St. Clair County; the Hon. B. H. CANBY, Judge, presiding. Heard in his court at the August term, 1895. Affirmed. Opinion filed March 7, 1896.

DILL & SCHAEFER, attorneys for appellant.

KNISPEN & ROPIEQUET, attorneys for appellee.

MR. JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

This suit was brought to recover damages for a personal injury, caused, as alleged, by the negligence of appellant in failing to furnish sufficient help and proper appliances for

letting a steam tank, of the weight of five hundred pounds, down into the basement of a building. It is alleged that appellee was simply a laborer, and did not know of the necessity of such additional help and of said appliances, and that appellant did, and that he was compelled by appellant, without such additional help and appliances, to do said work. The result of the trial was a verdict and judgment in favor of the plaintiff—appellee here—for the sum of \$3,000.

At the conclusion of the evidence the defendant offered an instruction directing the jury to find for the defendant, which the court refused. The main contention is that the evidence does not support the verdict or judgment. The evidence shows that appellee had been in the employ of appellant for some time, and had experience in the handling of boilers and tanks, but generally the handling was done under the supervision of another person. It also shows, in regard to the tank in question, that appellee requested additional help, and that a man by the name of Cullen was sent by appellant with directions to finish the work that day; that no ropes or tackle were taken along with which to lower the tank down the basement steps of the building, which would have been a safe method of doing the work, although appellant had a supply; that three men, including the appellee, attempted to lower the tank by hand down the steps, the appellee being on the lower side, and that the tank slipped as it was being lowered, and jammed appellee against the side of the wall inclosing the basement steps, whereby he was injured. There is evidence that five men were necessary to safely handle the tank by hand.

There is no evidence that appellee requested help in addition to that given, or suggested the use of ropes and tackle. It is considered, however, by a majority of the court, which does not include the writer of this opinion, that the judgment should be affirmed, as the questions of negligence on the part of appellant, and of care on the part of appellee, were fairly presented to the jury under the instructions of the court, and were matters exclusively for the consideration of the jury.

The judgment is affirmed.

**Lottie F. Banks, Adm'x, v. The City of Effingham.**

1. **MASTER AND SERVANT.**—*What Are Not Hazards of the Employment.*—When the master calls the servant from a place of safety and commands him to work in a place of danger, without warning him of the increased hazard, it can not be said that the danger is an obvious one, or a risk incidental to the kind of work, or a hazard voluntarily assumed by the servant.

2. **QUESTIONS OF FACT**—*Negligence and Ordinary Care.*—Questions as to whether or not the master is guilty of negligence, or the servant was in the exercise of ordinary care at the time of his injury, are questions to be passed upon by the jury under the evidence to be adduced by the parties, and not to be summarily settled upon the basis of common knowledge and experience, on a demurrer.

**Trespass on the Case.**—Death from negligence, etc. Error to the Circuit Court of Effingham County; the Hon. SILAS Z. LANDES, Judge, presiding. Heard in this court at the August term, 1895. Reversed and remanded. Opinion filed March 7, 1896.

WOOD BROS. and E. N. RINEHART, attorneys for plaintiff in error.

B. F. KAGAY and GILMORE & GILMORE, attorneys for defendant in error.

MR. JUSTICE SCOFFIELD DELIVERED THE OPINION OF THE COURT.

Plaintiff in error contends that the court below erred in sustaining a general demurrer to the six counts of the declaration in this case.

The first four counts are so clearly insufficient that they will receive no further attention in this opinion.

The fifth count alleges in substance that the city of Effingham, having lawful authority so to do, was engaged in constructing a ditch, or sewer, in one of its streets; that the ditch had perpendicular walls, and was made by digging down from the surface of the ground; that there was great danger of injury to workmen from the caving in of the earth unless the walls were braced; that the prosecution of

the work required a skilled superintendent, who should have knowledge of the matter of bracing, and should have charge of the work and workmen; that it was the duty of defendant in error to brace the walls for the safety of its employes; that the walls were not braced, or otherwise secured; that a superintendent was put over the work, but that he was wholly incompetent and without experience; that Samuel A. Banks, who had been working near the surface for five days, was wholly ignorant of the risks and dangers of his employment, or that bracing was necessary, or even that it was ever done; that defendant in error had full knowledge and notice of the foregoing facts; that defendant in error, by its said superintendent, commanded said Banks to work at a certain point thirteen feet below the surface, where there was great danger, and where the walls were unsupported, without giving said Banks any warning or advice; and that while said Banks was working at this place and exercising all due care and diligence, he was killed, without fault or negligence on his part, by the caving in of the wall.

Defendant in error advances certain propositions of law in support of the action of the court in sustaining the demurrer to this and other counts of the declaration. Among these propositions are the following:

"In performing the duties of his place, a servant is bound to take notice of the ordinary operation of familiar natural laws, and to govern himself accordingly.

"He is bound to use his eyes, and, if he fails to do so, he can not charge the consequences upon his master.

"Where an employment is attended with danger, a servant engaging in it assumes the hazards ordinarily incident to it, and, if he receives injury from an accident which is an ordinary peril of the service undertaken by him, he can not recover damages for such injury.

"A master is not bound to warn servants against obvious dangers, or to employ 'look-outs' or other servants to keep watch for dangers naturally incident to the employment, and perils that are liable from the nature of the work to be encountered; nor is a master bound to take greater care of the servant than the servant takes of himself."

It may be conceded that these and similar propositions state the law correctly, and yet the fifth count may be sustained as setting forth a good cause of action. It must be remembered that the question here is not one of the effect of evidence, but of the force of allegations, which, as far as they state facts, and are well pleaded, are conclusively presumed to be true when attacked by a demurrer.

The allegations of this count show that the excavation of the ditch, without supporting the walls in any manner, was dangerous to the workmen, but that Banks had no knowledge of this fact, and, after the exercise of reasonable diligence, was uninformed of his peril. In such case, if the master has actual knowledge of the danger, and does not impart that knowledge to an inexperienced workman, known to the master to be ignorant of the risk, there is an element of willfulness in the master's negligence, which takes the case out of the operation of the rules of law upon which counsel for defendant in error rely. Certainly the servant does not assume the risks resulting from the gross negligence of the employer, and the acts charged in the fifth count of the declaration amount to willful or gross negligence.

A case in point is *Johnson v. First National Bank of Ashland*, 79 Wis. 414, in which it was held that a corporation, whose building superintendent causes an excessive weight of snow or debris to be thrown and left upon the roof of a shed, in consequence of which it falls upon and injures an employe, who works under it by the superintendent's direction, is guilty of negligence and liable for the injury to the employe, if he himself is in the exercise of ordinary care, and that the employe can not be held to have assumed the risk of working under the shed, if he had no knowledge of the danger arising from the increased weight upon the roof. See, also, *Consolidated Ice Machine Co. v. Kiefer*, 26 Ill. App. 466, and *Wharton on Negligence*, Sec. 206.

The sixth count of the declaration presents even a better cause of action than the fifth. The particular element of danger charged in the sixth count, was the existence of pockets or deposits of quicksand near the bottom of the ditch. One may know that the walls of a ditch may fall,

in rare instances, from the weakness of the underlying strata; but he may not know that there are deposits of quicksand at a particular place to increase the hazard, and he may have no opportunity of ascertaining this fact until the yielding of the treacherous foundation places him in imminent peril. In this case the superintendent knew that deposits of quicksand had been encountered, and that Banks was ignorant of the fact and could learn of his danger only by experiment; and yet he called this workman from a place of safety and commanded him to work in a place of extreme danger, without warning him of the increased hazard. In such case it can not be said that the danger was an obvious one, or a risk incidental to this kind of work, or a hazard voluntarily assumed by the workman.

Whether or not the defendant in error was guilty of negligence in not bracing the walls of the ditch, or warning the deceased workman of the hazards of his employment; whether or not the risk was an obvious one under the circumstances of the case; whether or not the workman was in the exercise of ordinary care at the time when he was buried alive: these and other questions presented by the pleadings should be passed upon by a jury, under the evidence to be adduced by the parties, and not summarily settled here upon the basis of common knowledge and experience. *Huddleston v. Shop*, 106 Mass. 282; *Wharton on Negligence*, Sec. 217.

For the error in sustaining the demurrer to the fifth and sixth counts of the declaration, the judgment is reversed and the cause is remanded.

### Ohio & Mississippi Ry. Co. v. Town of Bridgeport.

1. RAILROADS—*Not Required to Build Bridges over Streams at Highway Crossings.*—Section 17, of Chapter 114, R. S., requiring railroad companies to construct and maintain crossings at highways and the approaches thereto within their rights of way does not require such companies to build bridges across streams for the use of the public in crossing such streams.

O. & M. Ry. Co. v. Town of Bridgeport.

2. *SAME—Crossings and Approaches.*—A crossing is that portion composing the track or roadway and approaches thereto, that is, to the railroad crossings of the highways, and is simply that prepared or made condition on each side of the crossing as will afford a safe, easy and convenient way to get to and over it on each side thereof.

3. *SAME—Notice to Construct a Crossing—Requisites.*—The notice required by Section 72, Chapter 114, R. S., to be given to a railroad company of the condition of crossings and approaches, must conform to the requirements of the statute.

*Assumpsit*, for moneys expended on building approaches to a highway crossing. Appeal from the Circuit Court of Lawrence County; the Hon. SILAS Z. LANDES, Judge, presiding. Heard in this court at the August term, 1895. Reversed. Opinion filed March 7, 1896.

JOHN G. DRENNAN and ANDREW J. LESTER, attorneys for appellant.

GEE & BARNES, attorneys for appellee.

MR. PRESIDING JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

The statute on which the right to recover in this case is based, provides in section 71 of chapter 114, S. & C. Rev. Stat.: "Hereafter at all railroad crossings of highways and streets in this State, the several railroad corporations in this State shall construct and maintain said crossings and the approaches thereto, within their respective rights of way, so that at all times they shall be safe as to persons and property." And in section 72: "Whenever any railroad corporation shall neglect to construct and maintain any of its crossings and approaches as provided in the foregoing section, it shall be the duty of the proper authorities, having charge of such public highways or streets, to notify, in writing, the nearest agent of said railroad corporation, of the condition of said crossings or approaches, and direct the same to be constructed, altered or repaired, in such manner as they shall deem necessary for the safety of persons and property." In section 73: "If any railroad corporation shall, after having been notified as provided in section 72, neglect, or refuse to construct, alter, or repair such crossings

or approaches, within thirty days after such notice, then said authorities shall forthwith cause such construction, alteration or repairs to be made;" and section 74 provides, the railroad corporation shall be holden for all necessary expenses in making such construction, alterations and repairs.

This court has expressed the understanding it has of the meaning to be given the words "crossings and approaches" in the opinion in Town of O'Fallon v. O. & M. Ry. Co., 45 Ill. App. 575, where it is said, a crossing is that portion composing the track or roadway and approaches thereto—that is, to the railroad crossings of the highways—and are simply that prepared or made condition on each side of the crossing as will afford a safe, easy and convenient way to get to and over it, on each side thereof. And "approaches thereto within their respective rights of way," means that in no event, as a statutory duty as to highways laid out over railroads already established, were such approaches to be extended beyond the limit of the right of way, although to make such highway passable, it might be necessary that such approaches should be extended beyond such limit.

This case was brought to this court, and is reported in 43 Ill. App. 89, and upon substantially the same facts as appear in this record. It was held that the railroad company owed no duty of constructing the bridge in question, and the verdict of the jury finding the company was liable for the costs of this construction was against the law and the evidence.

It was shown in the case at bar that on April 21, 1887, notice was served by appellee upon appellant's agent, that "*the bridge* over Indian creek at the crossing of the railroad, at a point where the same intersects the said highway leading from the south part of town, on Main street, is out of repair and dangerous, all said bridge being on the right of way of said railroad company, the supports of said bridge being rotten and the floor dangerous. The sills on which said supports rest are rotten and the south abutment needs rebuilding to make it safe for public use, and said board of trustees do direct that the same be rebuilt in



manner following: By *rebuilding abutments and placing over Indian creek a bridge*, with eighteen-foot roadway, with a three-foot sidewalk on each side for the accommodation of pedestrians, and the same to be constructed within thirty days from this date, as the law directs."

We have italicized portions of said notice, and the same does not notify appellant, as the statute requires, of the condition of its crossing or approaches thereto as we understand and have defined the meaning thereof, but notifies appellant a bridge is out of repair and demands that appellant rebuild it. Aside, however, from the objections to the form of this notice, and the substantial defects that appear when it is examined, this court has held as before stated, that this appellant owed no duty of constructing this bridge and was not legally liable for the cost of its construction. It is shown that before the railroad was built a bridge was constructed across Indian creek, and was a necessary structure to enable the public to travel that highway. And for many years after the railroad was built, a bridge built by the town was maintained by the municipal authorities as a part of the public highway at about the same place the bridge in question was built. And if the railroad was removed, or had never been built, a bridge across the creek would be a necessity, to be kept up in order that the public could use said highway, not imposed on the municipality by the construction of the railroad. This last mentioned bridge and the approach therefrom to appellant's track was used by the public and no complaint was made. Hence appellant had, under all the surroundings, restored the highway to its former condition, so as not to materially impair its usefulness, thus performing its statutory duty, and was not liable to pay for the building of the bridge in question.

The court erred also in modifying the following instruction on behalf of defendant: "The court instructs the jury that even though you may find from the evidence that the construction of the railroad made it necessary to construct the bridge over the creek in question, at the place in question, at a higher level than before the railroad was built,

that fact would not make the railroad company liable for the cost of the present bridge and approaches as sued for." The court refused to give this instruction as asked, but modified it by inserting the word "whole" before the word cost, which modification would authorize the recovery of a part of the cost of the bridge in question.

This same instruction was requested to be given on behalf of appellant at the former trial, but was modified by adding "unless you believe from the evidence such bridge was necessary to make approach to said crossing accessible," and this court held it was error to modify it. 43 Ill. App. 89. Two other of the instructions asked for by defendant were improperly modified by the court and for the same reason. And so in the two instructions given for plaintiff the same objection appears—that the jury are thereby instructed to allow for a part of the cost of building said bridge, or for part of the cost of building the approaches to the appellant's railway. The cost of the bridge, or a part of it, as before said, could not be legally recovered, and the notice would not justify the recovery of any of the costs for such approaches.

The verdict was for \$300, which necessarily included at least a part of the cost of building the new bridge, and ought to have been set aside. For the errors indicated the judgment is reversed.

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### The Phenix Insurance Company v. Howell Lewis.

1. *INSURANCE—What are Satisfactory Proofs of Loss.*—Where a policy of insurance simply requires that notice in writing of a loss shall be given to the company at a specified office, and that payment shall be made upon receipt of satisfactory proofs, not specifying otherwise of what such notice and proof shall consist, if a written notice of loss is sent to the office specified, and the company makes no objection to the form of the notice and demands no further or other proof, such notice is a sufficient compliance with the terms of the policy.

2. *SAME—Conditions of the Policy.*—Conditions in a policy of insurance, a failure to comply with which on the part of the insured works a forfeiture, are to be construed strictly against the insurers and

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Phenix Ins. Co. v. Lewis.

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liberally in favor of the insured, so that the latter will be held to nothing not expressly required by the terms of the condition.

**Assumpsit**, on a policy of insurance. Appeal from the Circuit Court of Saline County; the Hon. ALONZO K. VICKERS, Judge, presiding. Heard in this court at the August term, 1895. Affirmed. Opinion filed March 7, 1896.

F. M. and D. V. YOUNGBLOOD, attorneys for appellant.

A. W. LEWIS, attorney for appellee.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

"The controlling question to be determined by this court," "the single question" presented by this record, in the language of appellant's counsel, is the construction of those parts of policy No. 0344482, which relate to the proofs of loss. The evidence is sufficient to justify the findings and judgment of the court, if proofs of loss, other than the notices given, were not required by the policy under the circumstances of the case. To this single question we turn our attention.

Policy No. 0344482 was for \$500, of which \$350 was on appellee's dwelling house at Stone Fort, and \$150 on certain articles contained therein. On February 20, 1894, the building was wholly destroyed by fire, and most of the personal property insured was burned at the same time. Appellee gave personal notice of the fire to J. N. Walden, appellant's local agent, by whom the insurance had been effected, and also gave at least two written notices of the loss to appellant's general agent at Chicago, the last by a registered letter, for which a receipt was received in due course of mail. In one of these letters, appellee stated that his property had been totally destroyed by fire. No other written notice of the loss was given the company.

Appellee's property had been slightly damaged by fire on a former occasion, and Walden had furnished the blanks of this same company, on which appellee had made the proofs of loss, which became the basis of an adjustment with the

company. In fact, the evidence shows that it was the custom of the company to furnish the blanks for that purpose, through the local agent, if the loss was small, but to send an adjuster if the loss was as large as the one involved in this case, and to furnish the blanks through the adjuster if it was decided to pay for the loss.

Appellee applied to Walden for blanks after the second fire. Walden said that he did not have the blanks, but that he had notified the company of the loss, and that he was satisfied that the adjuster would come soon; that in case of a "fire of that size, they would send a man down," and "would attend to it right away."

Soon afterward, an agent of the company went to Stone Fort, whose business it was to "investigate the causes of loss." An investigation was made; the special agent and Walden "talked the matter over," concluded "that it was a suspicious fire," and decided to "await developments." Walden had already reported to the company, by letter, the circumstances attending the fire, having made inquiries on the subject of appellee himself.

No direct communication was made to appellee by the company, but his letters were filed away and left unanswered. Appellant was "awaiting developments," or, in other language, "lying low."

With the foregoing facts in view, attention should now be directed to the provisions of the policy relating to notice and proofs of loss.

It is first provided that appellant shall make good to the assured certain loss or damage, *on receipt of proofs of loss satisfactory to the company, at its Chicago office.*

It is also provided that "in case of loss or damage, the assured shall forthwith give notice of said loss in writing to the company;" that "the assured shall, *if required*, submit to an examination, or examinations, under oath, by any person appointed, and subscribe to such examination when reduced to writing;" that if the "policy is made payable in case of loss, to a third person, or held as collateral security, the proofs of loss shall be made by the party originally insured."

There is no other provision of the policy in any manner defining what is meant by proofs of loss, or showing what such proofs shall contain, or how the same shall be verified.

The first proposition of law which may aid in the solution of the question under consideration is thus stated in 2 May on Insurance, Sec. 465: "No doubt the usual stipulations that the insured shall furnish certain preliminary proofs of loss, when loss has been sustained, are conditions precedent, without compliance with which no recovery for a loss can be had. But in conformity to the general rule applicable to conditions precedent, a failure to comply with which works a forfeiture, they will be considered strictly against the insurers, for whose benefit they are imposed, and liberally in favor of the insured, upon whom they impose burdens more or less onerous; so that the latter will be held to nothing in this behalf not expressly required by the terms of the condition."

What do the terms of the conditions of this policy expressly require with reference to proofs of loss? As to the examination under oath, appellee is not required to take the initiative. He must submit to such an examination, if this is required, and not otherwise. The provision requiring the insured to give written notice of the loss was fully complied with by appellee's letters to the company's agent at Chicago. The provision that if the policy is made payable to a third person, etc., the proofs of loss shall be made by the party originally insured, does not explain what is meant by proofs of loss, but merely charges the party originally insured with the duty of making such proofs to the same extent and in the same manner as if such policy had not been made payable to a third person. Thus the question is narrowed down to the discussion of the force of the expression "satisfactory proofs of loss."

If the policy specified what the proofs of loss should contain, that would be an end of the argument. But the policy does not do that. It merely requires satisfactory proofs of loss.

Where the only stipulation on the subject is that the

proofs of loss must be satisfactory, and the insured is without any information from the policy as to what will be deemed satisfactory, must the insured prepare and forward proofs of loss as an experiment, for the purpose of giving the insurer an opportunity to object? In this case, appellee gave appellant written notice of the loss. He gave notice to appellant's agent at Stone Fort also, and asked for blanks, which had been furnished him before through the same channel. The agent notified the company, and a special agent went to Stone Fort and investigated the matter, and decided that the company would await developments. It had been the custom of the company to furnish blanks, either through the local agent or adjuster. It was the duty of appellant, in this case, to furnish blanks, or to say what would be regarded as satisfactory, before appellee was required to take further measures to furnish proofs of loss. While appellant had no right to make unreasonable exactions, yet appellant had the right to be *satisfied* with very little proof, or even with no proof at all. How could appellee divine the desires of this corporation and determine what would satisfy its official head?

Phoenix Ins. Co. of Brooklyn v. Rad Bila Hora C. S. P. S., decided by the Supreme Court of Nebraska in 1894, 59 N. W. Rep. 752, is in point. It is held in that case that where a policy of insurance simply requires that notice of loss shall be given to the company, at a specified office, in writing, and that payment shall be made upon receipt of proper proof, and does not specify otherwise of what such notice and proof shall consist, if notice of the loss be sent in writing to the office specified, and the company makes no objection on account of the form of the notice, and makes no demand for further or other proof, such notice is a sufficient compliance with the terms of the policy.

"The controlling question to be determined by this court" having been disposed of, we do not feel under obligation to consider other questions which counsel for appellant have not regarded as sufficiently important to justify an argument. The judgment is affirmed.

**Cleveland, C., C. & St. L. R. R. Co. v. Benjamin F. Bruce,  
Adm'r.**

1. **RAILROADS—Rights of Persons About to Cross the Track.—Contributory Negligence.**—A person approaching a railroad crossing and about to cross the track has a right to rely upon the presumption that the company will perform its duty of giving the signal required of it by law when its trains are approaching the crossings of a public highway, and is not guilty of contributory negligence if he fails to look for an approaching train.

2. **INSTRUCTIONS—Error in, When not Reversible.**—An error in an instruction which is not prejudicial to the rights of the adverse party is not sufficient cause for reversal.

3. **PRACTICE—When Objection Must be Specific.**—When an objection to the admission of evidence is of such a character that it may be removed by further proof, it must be stated specifically at the time the evidence is offered.

**Trespass on the Case.**—Death from negligent act. Appeal from the Circuit Court of Saline County; the Hon. ALONZO K. VICKERS, Judge, presiding. Heard in this court at the August term, 1895. Affirmed. Opinion filed March 7, 1896.

C. S. CONGER, attorney for appellant.

PARISH & WILLIFORD, and PARISH & PARISH, attorneys for appellee.

MR. PRESIDING JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

This suit was brought by appellee, as administrator, to recover damages under the provisions of the statute for the death of his intestate, averred to have been caused by the negligence of appellant's servants in operating its locomotive and train, and in failing to ring the bell or sound the whistle on the engine as required by the statute. And in one count it is averred that the president and board of trustees of the village of Norris City did in 1884, ordain, pass and publish, among other village laws and ordinances, the following:

"ARTICLE 15. RAILROADS, ETC.—*Be it ordained by the President and Board of Trustees of the Village of Norris City:*

SECTION 1. That no railroad corporation shall, by itself or agents, run any train, locomotive engine or car, within the limits of the Village of Norris City at a greater rate of speed than ten miles per hour.

SEC. 3. Every railroad corporation, engineer or other person, violating the provisions of sections one and two of this article, shall upon conviction be fined not less than five dollars, nor more than twenty-five dollars."

And that defendant, in violation of said ordinance, at and within the limits of said village, run and drove its said locomotive engine at a greater rate of speed than was allowable under said ordinance, to wit, at the rate of thirty miles per hour, and was running or driving said engine at that high and dangerous rate of speed at the time said intestate was struck and injured by said engine, and thereby then and there killed.

Issue was joined and the jury found defendant guilty and assessed plaintiff's damages at \$1,000. Defendant's motion for a new trial was denied, and judgment was entered for plaintiff for the damages so assessed and costs. To reverse this judgment defendant took this appeal.

The appellant, in the argument on its behalf, relies upon the following points for reversal: 1st. That deceased was guilty of such contributory negligence, by failing to look for an approaching train when attempting to cross the track of defendant, as would bar plaintiff's right to recover. The engine which struck deceased had been detached from its freight train nearly a mile northeast of the crossing where deceased was struck. It was running down grade at a very rapid rate of speed, double the rate allowed by the ordinance if witnesses testified truthfully, and without sounding the whistle or ringing the bell to announce its approach, or give warning thereof, to persons about to cross the track.

Running in this manner, as is shown by the preponderance of the evidence, into the crossing of two of the prin-



ciple business streets of the village, the beam on the front end of the engine struck the deceased as he was about to cross the east rail of the track, and his death resulted from the injury thereby occasioned. He was going east to his home in the village, along a public street, and the view of the approaching engine was obscured by obstructions that would have prevented him from seeing it if he had been looking for it as he approached the track. He was not apprised of its approach by either of the statutory signals, and knew, or is presumed to have known, the law required appellant to cause the bell to be rung or the whistle to be sounded on the engine, and knowing that to be its duty, he had the right to rely upon its performance.

Hearing no such signal, the attention of deceased was not attracted to his peril, and the jury had the right to find, in view of all the circumstances in evidence, that deceased was not guilty of contributory negligence, in the respect as contended for on behalf of appellant. St. L., V. & T. H. R. R. Co. v. Dunn, 78 Ill. 197; C., C., C. & St. L. Ry. Co. v. Baddeley, 150 Ill. 328; C. & A. R. R. Co. v. Sanders, 154 Ill. 531.

2d. It is insisted the court erred in giving instructions three and four for plaintiff, and in refusing to give certain instructions as requested by defendant below. The objection made to said instructions given for plaintiff is that the jury in respect of the measure of damages to be assessed, were instructed to assess the same at such sum as from all the evidence they should deem a fair and just compensation with reference to the pecuniary injuries resulting to the widow and next of kin of the deceased. The words "next of kin of deceased," are the words objected to, because, in the declaration, no claim is made for any one but the widow, who is averred to have been deprived of her means of support, and by the insertion of the words objected to, the jury were authorized not only to compensate the widow, but also include in such compensation the children of the deceased, who had not been injured, nor suffered pecuniary loss by his death. The instructions were not accurately correct, but it

is not shown or claimed that the damages assessed were excessive, and it is only upon the question of the amount thereof that the appellant could have been prejudiced by the instructions. No injury in this regard is perceived by us.

The 3d and 4th refused instructions requested to be given on behalf of defendant were properly refused. The instructions given on its behalf fully informed the jury of the necessity of the exercise of ordinary care and prudence by deceased as a condition precedent to the right of recovery. The refusal of the court to give the jury an instruction, "that before they could give any force or effect to the ordinance offered in evidence, they must believe from the evidence that such ordinance was in force at the time of the alleged injury," is the remaining error complained of.

As before stated, one count of the declaration sets up an ordinance of the village, passed in 1884, and avers the violation of sections thereof in running the engine within the limits of the village at a greater rate of speed than was by said ordinance allowed, and avers that thereby the injury to, and death of deceased resulted. In support of this count, as shown by the record, plaintiff offered in evidence said sections 1 and 3 of article 15 of the ordinances of said village. Defendant objected and especially excepted to the reading of section 3, of article 15, for the reason it had nothing to do with the case, and is misleading.

Section 1 forbade the running of any engine at a greater rate of speed, within the limits of the village, than ten miles an hour, and section 3 provided the penalty for violating section 1.

It will be observed that no specific objection was made to the reading of section 1, on the ground the ordinance was not published in pamphlet form, or was not in force and effect at the date of the accident, but it was a general objection. The objection, if of a character that may be removed by further proof and must be stated specifically, and this is not done at the time the evidence is offered, it is too late afterward in a court of review to object to its ad-

mission. Doyle v. Village of Bradford, 90 Ill. 415; L., N., A. & C. Ry. Co. v. Shives, 108 Ill. 628; C. & E. R. R. Co. v. People, 120 Ill. 671.

Having admitted section 1 in evidence, over a general objection, the court did not err in refusing to give said last mentioned refused instruction.

We are satisfied the jury were warranted by the evidence in finding the verdict they returned, and no sufficient reason appears for the reversal of the judgment. It is therefore affirmed.

CASES  
IN THE  
APPELLATE COURTS OF ILLINOIS.

FIRST DISTRICT—MARCH TERM, 1896.

**Blakely Printing Co. v. James H. Barnard.**

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1. GUARANTY.—*Consideration Essential.*—A consideration is essential to the contract of guaranty, and must be proved in cases where it is not implied.

*Assumpsit*, on a contract of guaranty. Appeal from the Circuit Court of Cook County; the Hon. CHARLES G. NEELEY, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed March 31, 1896.

A. L. FLANINGHAM and L. B. HILLES, attorneys for plaintiff.

No appearance by appellee.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee, who probably belongs to one of the more intelligent classes of men of business, has manifested his confidence in this court by filing no brief in his own defense.

The case is, that on the back of an account upon which there appeared to be a balance due from the Push Publishing Co. to the appellant of \$206.20, the appellee wrote, "February 1, 1895. Guaranteed to the extent of \$125, pay-

P., C., C. & St. L. Ry. Co. v. Story.

able February 15, 1895. Jas. H. Barnard." This suit is to recover that \$125.

The guaranty expresses no consideration, and none is proved; some consideration is essential. *Webbe v. Romona Oolitic Stone Co.*, 58 Ill. App. 222; cited in *Featherstone v. Hendrick*, 59 Ill. App. 497.

In this case no consideration can be implied under the principle held in the *Webbe* case, for the reason that the parties agree that forbearance was not the consideration; each of them attempting to prove a different, other and only consideration.

The parties had no communication with each other, and it does not appear that any person with whom either of them did have any communication ever had any communication with the other. So there is no proof that they ever agreed about anything. The verdict for the defendant was the only one which the evidence would warrant, and the judgment upon it is affirmed.

Pittsburg, C., C. & St. L. Ry. Co. v. Fannie Story.

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1. COUNSEL—*Improper Conduct of, etc.*—In the trial of an action against a railroad company for personal injuries, it is improper for counsel to seek to influence the passions and prejudices of the jury by interpolating into his argument statements without foundation in the evidence or justification from the circumstances, such as "I have no fault to find with the railroad company, except they will murder people and kill innocent women and children, sometimes."

2. SAME—*Duty of the Court.*—A trial court can not always keep counsel within proper bounds, but when they so far overstep the well recognized limits of legitimate argument their zealous excesses should be at least rebuked, and should never be sanctioned in the presence of the jury; the stamp of judicial approval upon such conduct is detrimental to the interests of a fair trial.

3. DAMAGES—*In Cases of Personal Injury.*—Exact compensation in cases of personal injury is incapable of ascertainment; what may be recoverable as a fair, reasonable and just compensation, must necessarily depend upon the varying circumstances of each particular case and can not be limited by fixed rules, and although the discretion of the jury

must be largely depended upon, yet the recovery, if any, and the amount of it must be based upon evidence.

4. *SAME—Mental Suffering.*—Elements of damages, mental as well as bodily suffering, when it is the result of an injury, may be properly considered in estimating the amount of damages in personal injury cases, but mental suffering not connected with the bodily injury, but caused by some conception arising from a different source, may not be considered.

5. *WITNESSES—Weighing the Testimony of.*—When the evidence of a permanent injury consists wholly in subjective symptoms dependent upon the statements and actions of the injured person and which, when taken in connection with other proofs, does not inspire the court with confidence, such fact should admonish the court to look with suspicion upon the other testimony of such person.

6. *REMITTITUR—Ordered in this Court.*—The court directs a remittitur of \$6,000 to be entered within ten days, otherwise the judgment is to be reversed, etc.

**Trespass on the Case, for personal injuries.** Appeal from the Superior Court of Cook County; the Hon. JAMES GOGGIN, Judge, presiding. Heard in this court at the March term, 1896. Remittitur ordered, etc. Opinion filed March 31, 1896.

*Statements of counsel to which objections were made:*

Mr. Hardy: "I have no fault to find with the railroad company except they will murder people—will kill innocent women and children sometimes."

(Objection by appellant, and objection overruled.)

"If the proof is sufficient to show the company is guilty, and show also to what extent this woman has suffered, then it is your duty to find that railroad company guilty; you will say, 'We, the jury, find the defendant guilty,' as you would if they were on trial for murder, 'and we fix the plaintiff's damages at so many dollars.'"

(Objection by appellant.)

"Now, gentlemen, what will you pay this woman? It is said that sympathy ought not to prevail. No, it ought not to prevail. That is to say, it ought not to take the place of evidence. But if there is evidence upon which you can base your verdict, then you have a right to exercise sympathy. We claim \$25,000. It is almost worth \$25,000 to be compelled to go through such a siege as this woman has been compelled to go through. It has cost her no slight sum and it will cost her many another one before she gets her money if you find a verdict for her."

(Objected to by appellant.)

Mr. Hardy: "Find for this woman as you would have twelve men find for your mother, for your wife, if she sat in this room."

(Objected to by appellant.)

The Court: "You must not interrupt any more."

GEO. WILLARD and B. F. RICHOLSON, attorneys for appellant.

The statements were unfair and highly prejudicial, and should not have been allowed. *Chicago & A. R. R. Co. v. Bragonier*, 13 Ill. App. 467; *Chase v. City of Chicago*, 20 Ill. App. 274; *Hennies v. Vogel*, 87 Ill. 242.

JOHN M. SOUTHWORTH, CHARLES M. HARDY and JULIUS STERN, attorneys for appellee.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellee was a passenger, bound from Chicago to New York, on one of the appellant's passenger trains.

Near a station named Tuscarawas, Ohio, the train in which appellee was so traveling collided with a west bound mail train on the same road, and the claimed injuries suffered by appellee were thereby incurred.

The trial in the Superior Court resulted in a verdict for \$12,000, from which appellee remitted the sum of \$3,000, and thereupon a judgment for \$9,000 in favor of appellee was entered, and this appeal is from such judgment.

The appellee was about forty-six years of age, and resided on a farm in Wisconsin with her two sons and a daughter. She had lived there twenty-six years, and performed all the usual household duties, and was in good health before the accident. She testified that previous to the collision she averaged from 135 to 140 pounds in weight, and that at the time of the trial (four years after) her weight was 170 pounds.

In the collision the baggage-master was killed and another employe severely hurt, but no passenger except appellee was injured.

The collision occurred about eleven o'clock in the forenoon of May 7, 1891. The locomotive and the express and baggage cars were disabled, but the passenger coach in which appellee traveled was, at least, left fit for present use, and about the middle of the afternoon it was attached

to another train and appellee continued onward in her journey to New York, where she arrived about eleven o'clock the following day, and on the day after that proceeded on to her ultimate destination in Connecticut.

The only evidence the record furnishes of what her condition was after the accident, and prior to her reaching Connecticut, is found in the testimony of appellee. After she had been in Connecticut a "few days," according to her testimony, and some time in "the latter part of May, 1891," according to his testimony, a physician was for the first time called to treat her. That physician visited her twelve or fourteen times between his first call and June 17th following, and on the faith of her representations of pain and disability suffered by her, and of certain external bruises, contusions and discolorations seen by him on her person, he prescribed for her during that period.

Appellee remained visiting at her niece's house in Connecticut some six months, and until in November, 1891, when she returned to Chicago, visiting on the way her sister in Linesville, Pennsylvania, and a cousin in Pierrepont, Ohio.

She remained in Chicago for a while and then went to Wisconsin for a short time, after which she returned to Chicago, and through the intervention of a friend was accepted at St. Luke's hospital as a patient, and remained there three weeks, in February, 1892.

It was while in St. Luke's hospital that she for the first time had medical treatment after that referred to in Connecticut.

There were not many objective symptoms, to use the language of the doctor, of physical injury to her, visible at the time she entered St. Luke's hospital, nor do we understand from the evidence that any such have become apparent since that time.

The evidence from that time on, and there is a great deal of it, with reference to her injuries, deals wholly with subjective symptoms, and for its weight rests upon her own statements and actions; and there is in some of the medical testimony, in her own testimony, and in the clinical report or record of her case, made when she was an inmate of St.



Luke's hospital, considerable evidence of a lack of genuineness in her case—probably not of actual simulation of an injury not received, or of actual malingery, as recorded against the record of her case in St. Luke's hospital, but of an exaggeration of the injury, owing to a highly wrought up condition of the nervous system, produced primarily by the injury and intensified by brooding over it.

The only pecuniary loss suffered by the appellee, that is shown by the evidence, is her disability to pursue her usual avocations as before, and her expenses in endeavoring to be cured. As to what such expenses were, appellee was asked by her counsel if she could state to the jury, or approximate, the amount of money she had expended for such purpose, and she replied that she could not, but added, "I should say in the neighborhood of \$3,000;" and upon being asked if she were able to give the items, answered: "I am not; no, sir."

Her treatment in St. Luke's hospital was free, and that received by her in the Sanitarium at Joliet, for the two days that she remained there, was in return for services rendered by her. And the physician who attended her in Connecticut testified that \$15 would cover his entire bill for services to her.

Drawing all reasonable inferences from all the other evidence concerning what may have caused expense to her, it seems as if her estimate of \$3,000 was needlessly extravagant, if not recklessly so.

Numerous errors have been assigned for a reversal of the judgment, among which the one calling in question the amount of the judgment on the ground of excessiveness, demands most serious consideration.

The trial was one of great length, and the result before a jury, except as to amount of the recovery, was such as common experience lends expectation of where there is an injured passenger on the one side and a railway corporation on the other.

The appellee, however, was not entitled under the law to more than compensatory damages. She was not entitled to

recover what a jury might, in the exercise of their sympathy, give to her, nor what the jury would have twelve men find for their mother or their wife, as they were urged to do by appellee's counsel in the closing argument. Nor was it proper for counsel to seek to inflame the passions and prejudices of the jury by interjecting into his argument to them a statement, without foundation in the evidence or justification from the circumstances, such as "I have no fault to find with the railroad company, except they will murder people—will kill innocent women and children sometimes." A trial court can not always keep counsel within proper bounds, but when they so far overstep well-recognized limits to legitimate argument, their zealous excesses should be at least rebuked, and should never be sanctioned in the presence of the jury, as was done by the court below in peremptorily overruling timely objection made thereto, and, in one of the above instances, adding a caution to objecting counsel that he "must not interrupt any more."

The exceptions to such language were well taken, and the offending counsel instead of the objecting one should have been judicially cautioned against a repetition. The stamp of judicial approval upon such methods of argument could hardly help being detrimental to the interests of a fair trial.

Exact compensation in cases of personal injury is incapable of ascertainment. What may be recoverable as a fair, reasonable and just compensation must necessarily depend upon the varying circumstances of each particular case, and can not be limited by fixed rules, and although the discretion of the jury must be largely depended upon, yet the recovery, if any, and the amount of it, must be based upon evidence. *C. E. & L. S. Ry. Co. v. Adamick*, 33 Ill. App. 412.

Mental, as well as bodily suffering, where it is the result of injury, may be properly considered in estimating the amount of damages. But mental suffering not connected with the bodily injury, but caused by some conception arising from a different source, may not be considered. *Chicago v. McLean*, 133 Ill. 148.

That the accident happened, and that the appellee was injured, and that the appellant is bound by law to make her full compensation for her injuries, the evidence furnishes abundant proof.

But concerning the extent of such injuries, we think the record fails to justify so large a judgment as was rendered.

As has been already said, the evidence of any serious and permanent injury to appellee consists wholly in subjective symptoms, which are dependent upon her own statements and actions for verification and foundation. Under such circumstances, very great caution should be observed.

Looking only at the record, the appellee does not inspire us with much confidence in her statement of facts concerning which other proof is preserved, and hence we can not avoid a distrust as to those facts of which her testimony furnishes the only evidence. That circumstance "should admonish us to look with suspicion upon whatever else he (she) may choose to swear to," as was said by Mr. Justice Caton in a case (*Fryrear v. Lawrence*, 5 Gil. 325, p. 329) where one swore to hearsay matters as being within his own knowledge. See also *Earle v. Earle*, 60 Ill. App. 360, p. 367.

Appellee testified among other things concerning the results of the collision to the car that she was in, as follows:

"The stove was overturned, the lamps were shattered and broken, the oil falling all over the passengers; the window glass was shattered and the car took fire, and the rear end of the car seemed to be thrown up a great distance."

We have not exhausted the record with reference to each of the details she so testified to, but it was clearly established by other evidence that the stove was not overturned, that the car did not take fire, that the windows, with perhaps one exception, were not broken, and that if any lamp was broken, no one complained of oil falling upon them.

This testimony of the appellee was probably not at all material to her right of recovery, but it shows her unreliability and tendency to exaggeration.

If she is so prone to magnify immaterial matters, what

confidence can we place upon her testimony as to material facts?

Moreover, her testimony heretofore referred to, regarding the expense she had incurred in her endeavors to become cured, is so utterly and recklessly exaggerated beyond any facts shown, and is so entirely improbable, considering her apparent means, as to cast further suspicion upon all her statements.

Considering, therefore, appellee's own testimony in connection with the uncertainty of much of the medical evidence and the records of St. Luke's hospital, wherein the diagnosis of her case is set down as "Malingery," and we feel that there has not been that certainty obtained regarding the extent of her injuries as warrants us in sustaining a judgment which of itself amounts to a small fortune, and is far in excess of what we think the record shows would constitute full compensation.

Entertaining these views, we pass over the other causes assigned for error, which, if material, may easily be obviated by a closer adherence to settled law upon another trial.

It seems, however, from a careful consideration of the whole record, that the appellee should have recovered a reasonable judgment, and if appellee shall elect within ten days to enter in this court a remittitur of six thousand dollars from the judgment of the Superior Court, the judgment will be affirmed for the amount so remitted down to; otherwise the judgment will be reversed and the cause remanded.

GARY, P. J.

I concur in the result, upon the ground that when a woman passenger says she was injured in the attempt by a railway to pass one car by another upon a single track, the railway will always have to pay for it.

**John J. Murray v. J. M. Doud & Co.**

83	247
88	645
89	592
83	247
167	368

1. **CONTRACTS**—*By Brokers—Bought and Sold Notes.*—A contract made through a broker, commonly known as a bought and sold note, is one recognized by the law and regarded by the courts as the parties intend it.

2. **SAME**—*Unaccepted Proposition to Alter.*—A proposition by one party to a contract to make a change in it is ineffectual to alter it unless accepted by the other party.

3. **PRACTICE**—*Effect of Pleas Not Verified.*—In a suit upon a written instrument where there is no plea verified as required by law denying its execution, such instrument must be taken as stating the contract between the parties.

4. **INTEREST**—*On Damages Sustained.*—It is not error to instruct the jury in an action for damages, sustained by reason of a breach of contract, that the plaintiff is entitled to interest on whatever damages he has sustained.

**Assumpsit**, for breach of contract. Appeal from the Superior Court of Cook County; the Hon. HENRY V. FREEMAN, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed March 31, 1896.

RUFUS KING and ALLAN C. STORY, attorneys for appellant.

A broker is thus defined by the ordinance of Chicago: "A produce broker is one who, for commission, is engaged in selling or negotiating the sale of goods, wares, merchandise, produce, or grain belonging to others." (Ordinances of Chicago, Sec. 1500.)

Benjamin on Sales thus describes them: Sec. 310. "There is a class of persons who make it their business to act as agents for others in the purchase and sale of goods, known to the common law as brokers."

Under the above ordinance, there can be no lawful "broker," except as to "goods" or other property actually in existence; the property to be sold must "belong to other persons." Unless in existence it is absurd to call it property, or to speak of ownership. *Coddington v. Goddard*, 82 Mass. (16 Gray) 434; *Davis v. Shields*, 26 Wend. (N. Y.) 341; *McMullen v. Hellberg*, L. R., 4 Ir. 94; *Moore v. Campbell*, 10 Exch. 323; *Langdell*, Cas. on Sales, 465, 568, 614.

The authority of the broker must be from each to sign the identical contract. Without authority from both, the contract is not the mutual obligation of each and is void. *Cummings v. Roebuck*, 1 Holt, 172; *Thornton v. Kenser*, 5 Taunt. 785; *Peltice v. Collins*, 3 Wend. (N. Y.) 459; *Davis v. Shields*, 26 Wend. (N. Y.) 349-350.

An action founded upon a transaction prohibited by a statute can not be maintained. *Seidenbender v. Charles, Adm.*, 48 S. & R. 150; *Neustadt v. Hall*, 58 Ill. 172; *Craig v. Missouri*, 4 Pet. 410; *Nash v. Monheimer*, 2 Ill. 215; *Lewis v. Headly*, 36 Ill. 433.

Things forbidden by law are legal impossibilities. *Anson on Contracts*, 144; 2 *Parsons on Contracts*, 186; *Bush on Contracts*, 458.

It has been repeatedly held that persons acting in capacities prohibited by law, without a license, can not recover compensation for such services. *Heth v. Green*, 73 Pa. St. 198; *Stanwood v. Woodward*, 38 Me. 192; *Stevenson v. Ewing*, 3 Pick. (87 Tenn.) 46; *Heustis v. Pickards*, 27 Ill. App. 270; *Sawyer v. Werterberg*, 9 N. Y. Misc. 210; *Braun v. Chicago*, 110 Ill. 186; *Chicago v. Honey*, 10 Ill. App. 540; *Distilling Co. v. Chicago*, 112 Ill. 19.

Unless both parties to a contract are bound, so that an action can be maintained by either against the other in case of a breach, it is not a contract, and neither is bound by it. *Stiles v. McClelland*, Colo. 89; *Townsend v. Fisher*, 2 Hilton 47; *Quick v. Wheeler*, 78 N. Y. 300; *Ervine v. Gerdon*, 49 N. H. 444; *McKinley v. Watkins*, 13 Ill. 140; *Jenkins v. Williams*, 16 Gray 158; *Richardson v. Hardwick*, 106 U. S. 252; *McDonald v. Bewick et al.*, 51 Mich. 79; *Ingle v. Tronette*, 120 N. Y. 21; *Chicago & A. R. R. v. Jones*, 53 Ill. App. 434; *Cutting Packing Co. v. Packers' Exchange*, 86 Cal. 574; *Angus v. Watson*, 51 Calif. 620; *Butt v. Ellett*, 19 Wall. 545; *Olney, Adm., v. Howe*, 89 Ill. 156; 1 *Addison on Contr.* (Morgan's Ed.), p. 34, Sec. 18; *Schnell v. Turner*, 130 Ill. 28; *Tucker v. Wood*, 12 Johns. (N. Y.) 190; *Nelson v. Haynes*, 66 Ill. 490; *Olney, Admr., v. Howe*, 89 Ill. 560; *Rofalovitz v. Am. Tob. Co.*, 28 N. Y. 274; 73 N. Y. 87.

If one sells what he has not now, and has made no contract for purchasing, or which is not then in existence, but intends to go into the market and buy, he can not enforce the contract. 1 Parsons on Contracts, 524; Low v. Pew, 10 Mass. 347; Bryan v. Lewis Ry. & M., 386; Loynes v. Smith, 1 B. & C. 1, 2 Dow & Ry. 23; Head v. Goodwin, 37 Me. 187; Stanton v. Small, 3 Sandf. (N. Y.) 230; Noyes v. Jenkins, 55 Ga. 586; Redd v. Burns, 58 Geo. 574; Brown v. Combs, 63 N. Y. 597; Hutchinson v. Ford, 5 Bush (Ky.) 318; Gittings v. Nelson, 86 Ill. 309; Stengard v. Smith, 43 Minn. 11; Wilkins v. Heavenritch, 58 Mich. 574; C. & E. R. R. Co. v. Dane, 43 N. Y. 240; Hurd v. Gill, 45 N. Y. 341.

There must be a tender and subsequent sale at market price before buyer can be made liable for goods bargained and sold. 2 Benjamin on Sales, 734 (Kerr's note).

The proper measure of damages is the difference between contract price and market price at time of breach. Benjamin on Sales, 735; Foos v. Sabin, 84 Ill. 565; Bagley v. Finlay, 82 Ill. 524; Sanford v. Benedict, 78 Ill. 309; Chicago v. Greer, 76 U. S. 726.

PECK, MILLER & STARR, attorneys for appellees, contended that an executory agreement to sell goods which are not yet in existence, or which the contracting party has not yet acquired, is valid as an executory agreement. "In relation to things not yet in existence, or not yet belonging to the grantor, the law considers them as divided into two classes, one of which may be sold, while the other can only be the subject of an agreement to sell, or executory contract." Benjamin on Sales, Sec. 78; Story on Sales, Sec. 186. The contract is valid, although the party agreeing to sell has no title at the time; Logan v. Musick, 81 Ill. 315; Wolcott v. Heath, 78 Ill. 433; Sanborn v. Benedict, 78 Ill. 309; Clarke v. Foss, 7 Biss. 552; Atkinson v. Bell, 10 B. & C. 277.

A contract in writing to be complete need not show mutuality on its face. Plumb v. Campbell, 129 Ill. 106; Jugla v. Trouttett, 120 N. Y. 27.

A promise lacking mutuality at its inception becomes

binding when the other party, within a reasonable time, engages to perform the contract on his part, by his beginning such performance in a way which would bind him to complete it, and by mutual performance. *Plumb v. Campbell*, 129 Ill. 109.

The contract does not lack mutuality. It imposes the reciprocal duties on Doud to produce and Murray to receive. *Consolidated Iron Works v. Moore & Co.*, 78 Ill. 65; *National Furnace Co. v. Keystone Mfg. Co.*, 110 Ill. 427; *Brown v. Rounsavell*, 78 Ill. 589; *Central Shade Roller Co. v. Cushman*, 143 Mass. 353; *Van Morten v. Babcock*, 23 Barb. 623; *Lake Shore & M. S. Ry. Co. v. Richards*, 126 Ill. 448; *Hibblewhite v. McMorine*, 6 Mees. & Welsb. 462; *Mortimer v. McCallan*, 5 Mees. & Welsb. 70, 76; *Brewer v. Michigan Salt Assn.*, 47 Mich. 526.

Where the agreement is for the sale of goods to be manufactured, the same rule applies as in the case of the sale of unspecified chattels; the contract is executory until the manufacture is completed and goods selected, separated and made ready for delivery. 21 Am. & Enc. L., 502.

The business of a factor and a broker are in many respects unlike, and in some similar. They are both agents of the owner to sell property. A broker is an agent employed to make bargains and contracts between other persons in matters of trade, for a compensation commonly called brokerage, or, in the language of Lord Chief Justice Tindal, "A broker is one who makes a bargain for another and receives a commission for so doing." He is a mere negotiator between other parties, and never acts in his own name, but in the name of those who employ him. When he is employed to buy or sell goods, he is not intrusted with the custody or possession of them, and is not authorized to sell them in his own name. He is a middleman, and for some purposes is treated as the agent of both parties. Where he is employed to buy and to sell goods, it is the custom to give to the buyer a note of the sale, called a sold note, and to the seller a like note, called a bought note, in his own name, as agent of each, whereby they are respectively bound, if he has not



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exceeded his authority. *Saladin v. Mitchell*, 45 Ill. 79; see also *Memory v. Neipert*, 35 Ill. App. 12; 131 Ill. 623.

That the broker had no license will not avoid the contract between the principals. 16 *Lawyer's Report Annotated* 425; *Pidgeon v. Burslem*, 3 Exch. 465; *Jessopp v. Lutwyche*, 10 Exch. 614; *Smith v. Lindo*, 4 C. B. N. S. 395.

The broker can recover, although he has no license. *Pope v. Beals*, 108 Mass. 561; *Angell v. Van Schaick*, 56 Hun 247; *Buckman v. Beagholz*, 37 N. J. L. 437; *Shepler v. Scott*, 85 Pa. St. 329; *Chadwick v. Collins*, 26 Pa. St. 138; *Prince v. Eighth Baptist Church*, 22 Mo. App. 352; *Johnson v. Hudson*, *Story's Comp. Laws* 748; *Lindsay v. Rutherford*, 17 B. Mon. (Ky.) 245; *Bull v. Harragan*, 17 B. Mon. (Ky.) 349.

The acts of a *de facto* agent or officer are binding between the principals, although he has no real title to the office or position through which he acts. *Sharp v. Thompson*, 100 Ill. 447; *Coles County v. Allison*, 23 Ill. 437; 5 Am. & Eng. Encyc. of Law, 96.

The same rule applies to *de facto* officers of private corporations, and other persons in private relations, as between third persons. 5 Am. & Eng. Encyc. of Law, 94, citing *Bank of U. S. v. Dandridge*, 12 Wheat. (U. S.) 64, at 70; *Atlas Nat. Bank v. Gardner*, 8 Bissell 537; *Despatch Line v. Belamy*, 12 N. H. 223.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The relations between these parties began by a bought note delivered to the appellant, and a sold note delivered to the appellees, by "a broker in beef and pork goods," as follows:

"CHICAGO, Nov. 3, 1891.

Bought of J. M. Doud & Co., Boone, Iowa.

Care of Lamson Bros., Board of Trade Bldg., Chicago:

Their entire production leaf, from date to January 1, 1892, at nine cents, Chicago delivery. You are to receive the leaf f. o. b. teams at any city depot or at any warehouse at Union Stock Yards, in such lots as they may ship. In

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the event that either party should become incapacitated in manufacturing by destruction of premises by fire, the sale to become null and void at such date. Goods to be in prime condition on arrival in Chicago. Terms, cash.

L. M. PRENTISS.

To J. J. Murray &amp; Co., Chicago."

"CHICAGO, NOV. 3, 1891.

Sold J. J. Murray & Co., your entire production of leaf lard from date to January 1, 1892, at nine cents, Chicago delivery. They are to take this leaf f. o. b. teams at any city depot, or at any warehouse at the Union Stock Yards, in such lots as you may ship. They would like, however, that you ship in lots about 5,000 pounds, when convenient to do so. In the event that either party should become incapacitated in manufacturing by destruction of premises by fire, the sale to become null and void at such date. Goods to be in prime condition for butterine purposes on arrival in Chicago. Always notify me as shipments start and where consigned, with car number. Terms cash.

L. M. PRENTISS.

To J. M. Doud &amp; Co., Boone, Iowa.

Care Lamson Bros., Chicago."

A moderate acquaintance with the ways of business enables us to know that by such documents contracts of sale are made, which the law regards as the parties intend them. Benjamin on Sales, Sec. 273 *et seq.*; *Memsey v. Niepert*, 131 Ill. 623, and cases there cited; S. C., 33 Ill. App. 131.

As the abstract shows no verification of any plea denying the execution of those instruments, copies of which were filed with the declaration, there can be here no question that they are truly the contract between the parties. Sec. 34 Practice Act; *Wabash R. R. v. Smith*, 58 Ill. App. 419.

The market price of lard declined during the time covered by the contract, and this suit is brought by the appellees to recover damages which they allege they sustained by the refusal of the appellant to take and pay for some of the lard.

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A part of the contest was as to a little over twelve thousand pounds of lard "produced" by the appellees in December, 1891, and arriving in Chicago January 1 and 5, 1892. The contract is silent as to time of delivery, and therefore the delivery was to be in a reasonable time after production, which might be later than any date mentioned in the contract. The appellant, however, relies upon a letter as a practical construction or rescission *pro tanto* of the contract, or as an estoppel—as follows:

"LAMSON BROS. & Co., COMMISSION,  
No. 6 Board of Trade,

CHICAGO, Dec. 31, 1891.

Messrs. J. J. Murray & Co., 109 Fulton Street.

GENTLEMEN: With to-day's car our contract for leaf lard expires. Dec. 14th you rejected 7,570 lbs., which we have Board of Trade certificate declaring to be good and sweet. Dec. 18th you rejected 4,100 lbs., which we sold to Friedman & Swift—total 11,670 lbs.—and they will certify that it was first-class.

Now, we wish to propose to you to ship you the amount, 11,670 lbs. next month, at the old price, 9c., and settle our differences this way and continue to let you have our lard at market price afterward. If you accept this proposition please let us know. We predict small run of hogs next three months and higher prices.

Yours truly,

J. M. DOUD & Co."

The appellant did nothing in consequence of that letter—in no way changed his position; and the letter was followed by another, as follows:

"LAMSON BROS. & Co., COMMISSION,  
No. 6 Board of Trade,

CHICAGO, January 2, 1892.

Messrs. J. J. Murray & Co., 109 Fulton Street.

GENTLEMEN: When we wrote you the other day—December 31—that the car at the Union Stock Yards completed the contract, the writer did not have your contract before him, but since referring to it we find that you are to take

our entire production during November and December, and no time stated for delivery. We killed 923 hogs Thursday, December 31, and the lard will be in by the first of the week. Mr. Prentiss informs us that you decline to take this lot or the one to come, so we have ordered both lots sold for your account and will render you a bill for difference accordingly, and insist upon payment for not only this but all other differences since the contract was made.

Yours truly,

J. M. DOUD & Co."

The appellees were entitled to whatever the contract, and the acts done under it, entitled them to, without regard to those letters.

All the questions of fact upon which the rights of the parties depended, were settled, upon conflicting testimony, by answers made by the jury to special interrogatories prepared by the appellant.

The appellant asked twenty instructions, of which the court gave a dozen, and we will add only that he got to the jury all the law that he had any right to, and a little more.

The attorneys seem to have had a boisterous time before the jury, but it does not appear that the attorney of the appellee got the advantage in the scramble, and we suspect that he could not have done so. *Cartier v. Troy Lumber Co.*, 35 Ill. App. 449; *Lake Erie & W. R. R. v. Middleton*, 142 Ill. 550.

The court instructed the jury that the appellee was entitled to interest on whatever damages he sustained. Cases, even in this State, conflict upon that question.

The instruction is in accord with *Driggers v. Bell*, 94 Ill. 223, and *Dick v. Sherwood*, 51 Ill. App. 343, 157 Ill. 325.

There is no error, and the judgment is affirmed.

This disposition of the case makes it unnecessary to pass upon the motion to strike out the bill of exceptions.

McAuliff v. Reuter.

**John McAuliff v. John Reuter.**

63a	255
166a	491
63b	255
169a	630

1. **PROMISSORY NOTE**—*Payable to Maker's Order.*—The title to a promissory note, drawn payable to the order of the maker, and indorsed and delivered by him, passes by delivery. 61 Ill. App. 32.

**Foreclosure.**—Trust deed. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the October term, 1895. Affirmed. Opinion filed March 31, 1896.

RUDOLPH D. HUSZAGH, attorney for appellant.

ALBERT H. MEADS, attorney for appellee.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

John McAuliff, the original appellant, brought this appeal to the last term of this court; it was submitted November 8, and decided December 2, 1895.

He was dead before that submission, and the judgment of affirmance then entered has been vacated and his administrator and heirs substituted in his place, who have filed an additional brief.

The hardship of the case appeals to our sensibilities, but nothing new as to the law is presented, and the decree must be again affirmed for the reasons expressed in the opinion first filed.

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**Comstock-Castle Stove Company v. W. W. Baldwin.**

1. **APPELLATE COURT PRACTICE**—*When a Decree will be Affirmed.*—Where there is nothing in an assignment of errors which questions the action of the court upon the exceptions taken to the master's report, upon which report the decree is founded, the decree will be affirmed.

2. **EQUITY PRACTICE**—*Exceptions to Master's Report.*—Exceptions to a master's report which are of that general character, requiring a search through the whole evidence to determine whether they are well taken, are unavailing. *McMannomy v. Walker*, 63 Ill. App. 259.

**Bill for Relief.**—Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed March 31, 1896.

JAMES E. PURNELL, attorney for appellant.

EDWARD OWINGS TOWNE, RICHARD H. TOWNE, and SMITH,  
HELMER & MOULTON, attorneys for appellee.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF  
THE COURT.

The appellant was complainant in a cross-bill filed in a chancery cause wherein the appellee was the complainant in an original bill, each of them endeavoring to have the assets of an insolvent corporation applied to the satisfaction of their respective claims against that corporation. The title of the appellant to relief was dependent upon establishing that the claim of the appellee was fraudulent. The case was referred to a master who reported against the appellant upon that question. Exceptions by the appellant to that report were overruled, so that the report stands, and if the exceptions were rightly overruled, the master's report is a proper foundation for the decree dismissing the cross-bill of the appellant.

There is in the assignment of errors nothing which questions the propriety of the action of the court upon those exceptions, and therefore the decree must be affirmed. *Ditch v. Sennott*, 116 Ill. 288.

It is true, as the assignment of errors implies, that the record does not show that the master's report was filed in the Circuit Court, but there were two stipulations in that court between the parties which treat the report as being on file. It is now sent up, over the certificate of the clerk, as part of the record of the Circuit Court, and filed here, as such, by the appellant.

It is not open to question that it was a part of the record upon which the court made the decree appealed from. And the exceptions to the master's report are of that general character, requiring a search through the whole evidence to

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determine whether they were well taken, which we have so often held to be unavailing. The subject is considered at considerable length in *McMannomy v. Walker*, 63 Ill. App. 259, and has been before us very often. *Minchrod v. Ullman*, 60 Ill. App. 400; *Williams v. Lindblom*, *Ibid.* 465.

The decree is affirmed.

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### Julius Schaper and John Stelzick v. Adolph Sutter.

1. PROBABLE CAUSE—*What Constitutes*.—All that is required to constitute probable cause for suing out an attachment and levying the same upon the goods of another is an honest belief, or strong ground of suspicion, and a reasonable ground of the belief or suspicion, and this may be upon information from others, as well as personal knowledge.

2. SAME—*As to Joint Tort Feasors*.—Several persons may act upon information worthy, apparently, of unhesitating belief, and fully believed by all but one of such persons, who may have such other information which he dare not disclose, as takes from him the protection of probable cause.

3. MALICE—*Abuse of Legal Process*.—Abusing the process of the law, to the injury of another, is of itself malicious.

**Trespass on the Case**.—Abuse of legal process. Error to the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the March term, 1896. Reversed and remanded. Opinion filed March 31, 1896.

ROSENTHAL, KURZ & HIRSCHL, attorneys for plaintiffs in error.

KNIGHT & BROWN, attorneys for defendant in error.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This was an action by the plaintiff in error against the defendant, for maliciously and without probable cause suing out an attachment, and levying upon the property of the plaintiffs. The jury seems to have been instructed by

thirteen lengthy instructions upon the theory that the jury would find anyhow for the plaintiffs, and therefore the court would leave no opening for the reversal of a judgment by denying any of the instructions asked by the defendant.

Inadvertently, the court inserted, as a modification of one of those instructions, a recital "that defendant was not prompted by malice, and that defendant believed that said affidavit was true." The only defense attempted of this modification is that while "those words were not so connected with the other portions of the instruction as to read smoothly, in view of the other instructions, the jury could hardly have been misled." The suit was originally against several defendants, as to all of whom, except the defendant in error, the action was discontinued during the trial. One instruction told the jury that in order to recover, the plaintiffs must show that "neither the defendants, nor any of them, nor any one acting on their behalf, had any reasonable or probable cause for causing said writ to be issued."

Another instruction was, that to constitute malice it was necessary that the conduct of the defendants was "from a stronger motive than the desire to collect their debt against the plaintiffs, and from a stronger motive than mere spite against them because they have not paid the said debt."

Perhaps the instruction on probable cause did no other harm than that it increased the pressure upon the jury, resulting from the iteration and reiteration, in many variations of phrase, of the burden the plaintiffs were carrying, to find for the defendants.

But it is very bad in itself. All that is required to constitute probable cause is an honest belief, or strong ground of suspicion, of the plaintiffs' guilt, and a reasonable ground of the belief or suspicion; and that may be upon information from others as well as personal knowledge. *Harpham v. Whitney*, 77 Ill. 32.

Several plaintiffs may act upon information worthy, apparently, of unhesitating belief, and fully believed by all but one of the several plaintiffs; that one may have such other information, which he does not disclose, as takes from



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him the protection of probable cause, and yet the instruction protects him because the others had probable cause, *reductio ad absurdum*.

The instruction as to malice is supported by the case cited by the defendant—*Splane v. Byrne*, 9 Ill. App. 392—but there must be some mistake in the text there. Abusing the process of the law, to the injury of another, is of itself malicious. *Krug v. Ward*, 77 Ill. 603.

We can not go through all the instructions, nor is it necessary. There are few subjects upon which the principles of law are more familiar by decisions of this State than upon malicious prosecution.

The judgment is reversed and the cause remanded.

John McMannomy v. Edwin Walker et al.

1. **EQUITY PRACTICE**—*When the Master has not Followed the Terms of the Reference.*—If a master to whom a cause is referred does not follow the terms of the reference the remedy is not by excepting to his report but a special application should be made to the court for an order to have the irregularity corrected.

2. **SAME**—*When the Report is Right upon the Facts but Wrong upon the Law.*—If the master has reported the facts correctly, with a wrong legal consequence, no exception is necessary. The question may be raised without taking exceptions to the report.

3. **SAME**—*When the Master's Conclusions of Fact are to be Questioned.*—If the master's conclusions of fact are to be questioned exceptions to his report must be taken.

4. **SAME**—*Taking of Accounts.*—If accounts to be taken in the course of a chancery suit are difficult or complicated they must be referred to a master, not because of any statute but by usage and practice, and the master must report his conclusions thereon. The parties can not put their labor upon the court, and if the court assumes the labor it is error. If done by stipulation of the parties the decree will be affirmed without examination.

5. **SAME**—*Practice in Stating Accounts.*—The master should require the parties first to state their own accounts so that the evidence may be confined to disputed items; in some cases the court will order an account to be prepared by a party complainant with his bill, so that the proceedings shall be in reasonable form in case of an appeal.

63	256
63	257
63	297
63	374
64	106
64	330
64	348
63	256
66	477
68	250
107	497

6. *SAME—When the Account is Stated—Proceedings Before the Master.*—The master having stated the account, and given notice to the parties that he has prepared a draft of his report, either party may, before the master, object to any conclusion of the master. If the master adheres to his conclusions the party may renew his objections, as exceptions before the court, to the same conclusions.

7. *SAME—Exceptions, When Overruled by the Master.*—When objections to the conclusions of the master are disallowed, if the objecting party desires it the master must report to the court the exceptions disallowed and state specifically all the evidence relating thereto, and upon which such conclusions were reached, when such exceptions will stand for hearing before the court.

8. *SAME—Report to be Received as True if no Exceptions are Taken.*—It is not the province of a court to investigate items of account. The report of the master is to be received as true when no exception is taken; and exceptions taken are to be regarded so far only as they are supported by the special statements of the master, or by evidence which ought to be brought before the court by a reference to the particular testimony on which the exceptor relies; for otherwise the court will not wander at large into the evidence in order to ascertain whether, by possibility, the master was wrong in his conclusion or not.

9. *SAME—Province of the Court—Report of the Master.*—It is too much to ask of the court to grope through vast masses of testimony in search of error which is alleged to exist somewhere, and by connecting the accountant with the judge to ascertain what the error is; it was the duty of the dissatisfied party to except to such items as he considered improperly charged, and it would then have been the duty of the master to certify the evidence by which the disputed item was sustained.

10. *STATUTES CONSTRUED—Chancery Practice.*—Section 39, chapter 22, R. S., entitled "Chancery," providing that the court may upon default, or upon issue being joined, refer a cause to a master in chancery or special commissioner to take and report evidence, with or without his conclusions thereon, has no relation to taking accounts.

**Creditor's Bill.**—Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed March 31, 1896.

JOHN M. SOUTHWORTH and WILLIAM BROWN, attorneys for appellant, contended that it is too late for counsel to urge the insufficiency of exceptions in this court. But even were it in apt time, this court, upon observing the exceptions, will find they adequately point out the grounds for objection to the report of the master as to the allowances to Walker. It was and is impossible to point out any evidence to justify

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this sequestration to the use of Mr. Walker of the enormous sum of \$127,000 under the pretense of paying him for services of no great extent when compared with the sum appropriated. It is the lack of evidence to sustain the master's report that justifies the exceptions, one and all. It was impossible to point out what does not exist. There was but one fact which the master was to report upon, and that was, what should Mr. Walker be allowed? and all the testimony taken before him related to that fact, and it is absurd to now say that the exceptions to the master's report should point out the evidence which did not justify the allowances made to him, when it was all taken with reference to those allowances and none of it justified such allowances.

But these exceptions are not wanting in any of the elements of certainty, and are not obnoxious to the objections raised by counsel for appellee. The cases cited are all very good law, but are not in any respect authority against the adequacy of these exceptions when applied to this case. These exceptions question the conclusions both of law and fact, as reported by the master, and we respectfully submit that there is no evidence or law which justifies and sustains his conclusions upon either.

By reference to the case of *Deimel v. Parker*, 59 Ill. App. 426, this court will observe that the exception here questioned is in no respect like the one held to be insufficient in that case.

In order, however, to meet the objections of counsel for appellee (which we, by the way, regard as exceedingly technical), we propose to take up and discuss the important and principal exceptions filed in this case, and to show that the evidence for and against the matter embraced in said exceptions ran through every page of the evidence taken by the master and reported in this cause. Take for example the sixth exception: "For that the master has found that the sum of \$85,000 is a fair and reasonable compensation for the services performed by the said Edwin Walker as the attorney of the said Chicago, D. & V. R. R. Co."

There is scarcely a page of the evidence taken before, and

reported by the master, that does not allude to and that was not taken with reference to this exception. The only "pointing of the evidence to sustain" that objection that could have been done, would have been to have suggested the whole of the evidence taken by the master, and as the case was referred to him to find what was the "usual and ordinary compensation paid for such services," and as nearly all the evidence taken was upon that point, no particular portion of it could be pointed out by objections or exceptions.

This, the sixth exception, is and was the most important exception filed. To have said that it should have pointed out the evidence to sustain this exception would simply have been to refer to the master's report.

Also take the seventh exception, viz., that the master has not found what is the usual and ordinary compensation paid for such services as were rendered by the said Edwin Walker, etc., as the said master was in and by said decree and order of reference ordered and directed to do.

This exception directs the attention of the court to the order of reference, viz., the decree and the report of the master, which would seem to be sufficiently definite. It could not be more so. The tenor of all the evidence sustains this exception.

The eighth exception is susceptible to the same interpretation as that of the sixth exception. And also as to the thirteenth exception there was absolutely no evidence to sustain the finding there referred to. And there being no evidence none could be referred to or pointed out.

There are various other exceptions that could not be construed as referring to any other than Mr. Walker's testimony, and hence sufficiently definite. But there is one notable exception filed and not excepted to by counsel for appellee, viz., the fifteenth, which says:

"For that the said master has allowed the said Edwin Walker a credit of \$2,000, secured by him in bonds instead of coupons thereof, which is no proper credit."

There is absolutely no evidence in the record to support this finding, and so none could be pointed out or referred to.

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It was allowed in order to balance Mr. Walker's account, and for no other purpose. We challenge this or any court to find in this record a particle of justification for this allowance. It was arbitrary, unjust and indicative of the evident intention of the master to give to Mr. Walker all he claimed with or without evidence.

We will not follow the objections raised by counsel for appellee any farther than to say, of one and all of these criticisms, that they are hypercritical and evince an overlearning in unrestrained and visionary technicalities, which are made use of to becloud real questions, and to lead the court, if possible, from a consideration of the merits of this controversy between a creditor of a bankrupt company and a director who is attempting to enrich himself with the spoils of the affray, at the expense of those who in good conscience should have the fruit of his honest toil.

T. A. MORAN and S. S. GREGORY, attorneys for appellees, contended that if the appellant has not preserved proper exceptions to the report of the master, then the decree must be affirmed.

This court has repeatedly laid down the rules of chancery practice necessary to be observed in taking exceptions to the report of a master. Unless these are followed, the errors of the master become, to borrow a phrase recently employed by a member of this court on a public occasion, "judicially invisible," or perhaps, to speak more consistently with the idea that justice is always pictured blind, "judicially inaudible." The earliest case in which this subject was fully discussed in this court seems to be *Huling v. Farwell*, 33 Ill. App. 238.

There is in this case considerable citation of authority, and on the question of general exceptions, such as are filed here, it was said:

"The reasons for requiring a report assigned in *Moss v. McCall*, 75 Ill. 190, are no reasons at all, if by general exceptions the court may be required to search the whole evidence and determine whether upon all of it the master has reached right conclusions of fact. All of the exceptions on

both sides should have been overruled, as they only showed the dissatisfaction of the parties with particular findings of the master but gave the court no clue to the data upon which the master acted." *Ib.* 242.

This was soon followed by *Heffron v. Gore*, 40 Ill. App. 257, in which the rule was briefly stated, thus:

"The court will not wander at large into the evidence, and therefore, either party who may wish to object before the master and except before the court, to the allowance or disallowance of any item, should require the master to state the evidence and reasons upon which he allows or disallows that item." *Ib.* 265.

In *Brown v. McKay*, 51 Ill. App. 295, the matter was again considered, and it was said: "These exceptions require the court to search through the mass of evidence to determine if they are well taken. There is a neglect to point out what the evidence is upon the conclusions of the master, which the party disputes. Such a practice renders the report of the master of no assistance to the court and is one which the court is not bound to tolerate" (citing cases).

Again:

"If either party is dissatisfied with the master's report, exceptions may be filed thereto; if the exceptions be to findings of fact, the evidence as to such facts should be set forth or pointed out with such directness that the court may readily find the same without searching through the entire record." *Ib.* 299-300.

There is in this case a very full citation of authorities.

In *Hodson v. Glass Co.*, 54 Ill. App. 248, the same ground was again traversed, and this explicit and definite language employed:

"Seventeen exception were taken to the master's report. The exceptions, instead of pointing out the evidence which, it is claimed, shows the conclusions of the master to be unwarranted, and by reference to the pages of the proofs returned by the master with his report, making it easy for the court to find upon what the exceptions are based, in effect call upon the chancellor to search through the evi-

dence and find, if he can, that which will justify the exceptions.”

“Exceptions are to be regarded so far only as they are supported by the special statements of the master, or by evidence which ought to be brought before the court by reference to the particular testimony on which the exception relies” (citing cases).

“The chancellor would have been justified in overruling the exceptions to the master’s conclusions upon the facts for the reason alone that the particular evidence relied upon to sustain such exceptions was not pointed out with such definiteness that it could easily be found without searching, either through the mass of evidence, or unnecessarily through any part thereof.” *Ib.* 250.

However, counsel seem to be slow to heed the admonitions of this court in this regard; and so it happens that in the last volume of the reported decisions of this tribunal are to be found three cases in which the same disregard of the settled rules of procedure in chancery is commented upon: *Friedman v. Schoengen*, 59 Ill. App. 376, *Wolcott v. Lake View Bldg. & Loan Association*, *Ib.* 415, and *Springer v. Kroeschell*, *Ib.* 434.

In the first of these cases this court said, p. 377:

“To this report objections filed before and overruled by the master were refiled in court as exceptions. All of these exceptions are based upon the proofs, not upon the master’s conclusions as to the facts. They might properly have been overruled, because there was not as to either, any specific pointing out, by definite reference or citation, the particular evidence relied upon to maintain the exception; on the contrary, the chancellor was asked to search through the entire mass of proofs and find evidence which would sustain the exception.

“Such a course renders the report of the master of no assistance to the court, and is one which it is under no obligation to tolerate.”

In the second case the court said, p. 419: “Substantially all of said exceptions are based upon the evidence, yet none

point out the evidence upon which appellant relies to sustain the exception. The court is called upon to search through the entire mass of evidence to see if something can not be found which will sustain the exception. The court is under no obligation to do this. Such a course renders the report of the master of no assistance, and is one which it is under no obligation to tolerate." In the last of the three cases it was said, p. 537 :

"We might decline, under well established rules, to examine the voluminous and complicated record to which only such general exceptions were filed. This is a court of review, and generally only such matters as have been pointed out in the court below, and considered there, are proper subjects for review here." Following this language, a number of cases in this and other jurisdictions, sustaining this proposition as applied to exceptions to a master's report, are cited and quoted from. *Rockwell v. O'Brien-Green Co.*, 62 Ill. App. 293.

The exceptions of the appellant in this case are open to these objections and some of them to others. The first exception is as follows :

"First. For that the said master erred in finding, and by his report has found, that the said Edwin Walker was 'retained' by the receiver of said Chicago, Danville & Vincennes Railroad Company as his counsel only, and paid for his services to said receiver the sum of \$4,000 per annum, because the evidence taken before the said master, and the vouchers signed by the said defendant Edwin Walker, show that he, the said Edwin Walker, received from said receiver the sum of \$400 per month, or at the rate of \$4,800 per year, instead of \$4,000, as found by said master in his said report."

The form of this exception well illustrates the propriety of the rule so frequently announced by this court. For, on looking into the record, with the aid of appellant's brief, it is quite impossible to find any evidence to sustain this exception. It does appear at the place referred to in the brief that for services as solicitor to the receivers Mr. Walker



received, or at least the master of the Federal Court reported that he ought to receive, \$400 per month for February, March, April and May, 1875.

But it is a matter of no importance whether he was paid \$4,000 or \$4,800 per year as solicitor for the receivers. His services as such are quite distinct from those for which he was entitled to retain the bonds claimed to be assets of the Danville company. Where a receiver, representing mortgage bondholders, undertakes the management of an insolvent railroad company, it is not proper nor usual for him to defend or prosecute, at the expense of such bondholders, litigation in which not they, but the insolvent corporation, may be interested. All claims against the company, not prior to those of the bondholders, are matters essentially foreign to his trust. He should not expend the funds of those whom he represents in their defense. Some claims, where priority is asserted over the lien of the mortgage, like those for material, equipment, labor, etc., just prior to the receivership, require his attention, but none other. This is, therefore, a wholly immaterial matter, but if it were material, unless something can be found in the record other than what is indicated by counsel, the master's finding on this point can not be impeached. The reference in the brief on this point is to page 137 of the abstract, and record, 243. At the latter place is found the report of the master in chancery of the Federal Court. P. 137 of the abstract, so far as this point is concerned, is as follows:

Abstract of petition of Edwin Walker for allowance of salary as solicitor for Chicago, Danville & Vincennes Railroad Company. Cause entitled:

In Circuit Court U. S. Northern District Illinois.

FOSDICK & FISH	}	In Chancery.
vs.		
CHICAGO, DANVILLE & VINCENNES		
RAILROAD COMPANY.		

To Judge of Court:

Edwin Walker represents, has been solicitor Chicago, Danville & Vincennes Railroad Company, and was such during the months of February, March, April and May,

1875; Brown and Hammond, *de facto* receivers during said months.

Petitioner represents: That during said months he had charge of the legal business as before, salary past year \$400 per month; had returned vouchers for amount to company for said months, but not paid. States services rendered at request of receivers and now due him as salary \$1,600, and expense \$44.30. Prays receiver have authority pay same and charge operating expense of road.

Copy letter receivers to Walker, March 5, 1875.

Shows authority for receivers to appear as attorney in all suits and asks if Walker is willing to assist in defense of same.

Letter of Walker to receivers, March 6, 1875.

Will furnish statement of suits, and claims authority from court to defend suits of road.

Letter of receivers to Walker, March 8, 1875.

Desire Walker to assist their counsel on behalf of receivers.

Master's report U. S. Court on above petition.

The next exception is as follows:

"Second. For that the said master finds that said retainer covered only consultations and advice to the said receiver, and attending to suits in which the receiver was personally made a party," etc.

That this exception goes to the ruling of the master upon a question of fact arising on the evidence, and wholly fails to conform to the rule of this court, in even faintly indicating upon what evidence it is based, is too patent for discussion. But it is wholly unsupported by the evidence.

The third, fourth and fifth exceptions may be grouped together, and are as follows:

"Third. For that the said master does not find that he, the said Edwin Walker, was employed by the receiver for the purpose of and was paid by said receiver for and to prosecute and defend all suits brought by or against said railroad company, whether theretofore or thereafter commenced, and that the sum paid to said Edwin Walker by said receiver for his, the said Edwin Walker's services as an at-

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torney, was payment in full for all services rendered by the said Walker in the prosecution and defense of all suits for or against the said railroad company, and for all services performed by the said Walker in connection with said railroad company or receiver during the time he was so employed, and paid by said receiver between the first day of February, 1875, and the ninth of June, 1877, excepting for services in the foreclosure cases in the decree rendered herein mentioned.

Fourth. For that the said master finds that the moneys paid by the said receiver to the said Edwin Walker did not cover, and that he was not paid for any services rendered by said Walker on the various intervening petitions filed in the case of Fosdick & Fish v. Chicago, Danville & Vincennes Railroad Company, or the case of Stephen Osgood v. Chicago, Danville & Vincennes Railroad Company.

Fifth. For that the said master did not find that the employment and payment of the said receiver by and to the said Walker, did not include his, the said Walker's services in all matters pertaining to the said railroad company except said foreclosure suits, including services performed in connection with all intervening petitions filed therein."

In none of these exceptions is there the slightest reference to any testimony which appellant claims sustains them. The reason of this probably is, that there is no such evidence. There is not in the record anything on which to base any or either of them. The application of the rule contended for, therefore, works no hardships to the appellant so far as these exceptions are concerned. The next is as follows:

"Sixth. For that the said master has found that the sum of \$85,000 is a fair and reasonable compensation for the services performed by the said Edwin Walker for the Chicago, Danville & Vincennes Railroad Company."

This is a classical example of those exceptions which this court has repeatedly declared, avail a party nothing. It is simply an invitation to the court to retry this question on all the evidence, to "search through the evidence and find, if he (it) can, that which will justify the exceptions." By

it "the court is called upon to search through the entire mass of evidence, to see if something can be found which will sustain the exception."

The next two exceptions are as follows :

"Seventh. For that the said master has not found what is the usual and ordinary compensation paid for such services as were rendered by the said Edwin Walker as the attorney of the said Chicago, Danville & Vincennes Railroad Company, as he, said master, is in and by said decree and order of reference ordered and directed to do.

Eighth. For that in so finding that the sum of \$85,000, received by the said Edwin Walker as compensation for his, the said Walker's services, is a fair and reasonable compensation for his services performed for the said Chicago, Danville & Vincennes Railroad Company is not in accordance and compliance with the order of reference and decree of the court in this cause, and is not the usual and ordinary compensation paid for such services, but is in amount far in excess thereof, and is exorbitant, unreasonable in amount, and inequitable and unconscionable."

The basis for each of these is the same, namely, that the master did not proceed in accordance with the interlocutory decree, referring the cause to him.

This has been by this court expressly decided to be not the subject of exception. *Deimel v. Parker, Jr.*, 59 Ill. App. 426.

It would not be difficult to fortify this decision with abundant citation of authority, if such were necessary. 2 Daniel, 1309, note 1; 2 Beach Eq. Pr., Sec. 702.

The next two exceptions refer to the same matter, and are as follows :

"Ninth. For that the master has erred in finding that the expenditures and outlays not refunded to him, the said Edwin Walker, for and on account of the said Chicago, Danville & Vincennes Railroad Company arising out of its litigations as its attorney and solicitor, amounted to the sum of \$20,000, because he, the said Edwin Walker, has filed no itemized account of or vouchers for the said sum as he must do before the said expenditures can be allowed to him.

Tenth. For that the master has found that the sum of \$20,000 (was) expended by the said Edwin Walker as expenditures and outlays were not, nor any portion of them, proper expenditures that he, the said Edwin Walker, should have made for or on account of the said Chicago, Danville & Vincennes Railroad Company arising out of its said litigation, the allowance for which is in said decree provided for."

These two exceptions are clearly within the condemnation of the rule held by this court, as in no manner referring to the evidence on which they are based, and the ninth is so obviously baseless as to require no consideration, if sufficient in form. It is quite untenable to say that in an account a master must disallow items established by competent evidence, because an itemized account thereof or vouchers therefor are not filed. The tenth treated as in proper form is, if intelligible, also manifestly unfounded in fact.

It is a rule of chancery procedure, that where one general exception is taken to a report, including several distinct matters, and the report appears right in any one instance, the exception will be overruled. 1 Barb. Chy. Pr. 552.

The interlocutory decree required the master to find the amount of any proper expenditures that Mr. Walker had made as such attorney for the Danville company and what services he had performed, etc. The sum of \$20,000 referred to in this exception was made up of various disbursements made by Mr. Walker for the Danville company and testified to by him. As this exception goes to the whole amount without discrimination, and as there is evidence tending to sustain the finding of the master in this regard this court will refuse, acting on a principle analogous to that just quoted, to disturb this finding if it is, as to any considerable part, clearly right. In order to procure a review by this court of the action below on this, appellant should have distinctly indicated, either the items or the specific portion of the sum of \$20,000 which was improperly allowed.

By one general exception, alleging that it was all of it improperly allowed, he simply invites judgment on the question, was it all improperly credited to Mr. Walker. Clearly

the greater part of it was not, for it was made up of a judgment against the Danville company which, with interest and costs made up about \$15,000 and was paid for the company by Mr. Walker. It is not remarkable that after such a lapse of time, and in view of the fact that by the payment to Mr. Walker in Eastern Illinois bonds, all matters between him and the company were supposed to be finally settled and closed up, he should not have been able to produce a more detailed statement, nor go into these matters more minutely.

The next two exceptions refer to the conveyance of the Chittenden farm, and are as follows:

"Eleventh. For that the said master has found that no credit should be made by the said Edwin Walker, or charge to him by reason of the conveyance to him, the said Edwin Walker, of the certain piece of property known as the Chittenden farm, for and upon the expenditures so made, as claimed, by and about the foreclosure suit against said Chicago, Danville & Vincennes Railroad Company.

Twelfth. For that the said master has not found, from the evidence herein, that the said Edwin Walker sold the said Chittenden farm for the sum of \$24,000, and that the said sum, or whatever sum the same might be sold for, and the conveyance so made thereof to him, the said Walker, should be, and was to be in full payment of and for any and all expenditures made by the said Edwin Walker for and on account of one certain appeal bond, and all other expenditures made by the said Walker for and on account of said litigation prosecuted by the said Walker for the said Chicago, Danville & Vincennes Railroad Company."

These exceptions also are plainly open to the objection already pointed out in that they do not in any way indicate or refer to the evidence on which they are based. However, the master found, and the evidence warrants the finding, that Judson, Young and Tenny, having bought this property, and incurred obligations for the payment of the purchase price which they were utterly unable to meet,

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their interest in the property being worth absolutely nothing, induced Mr. Walker to relieve them of this burden, assume their obligations and make their payments. In consideration of the risks which he thus incurred he was to have whatever he made out of it.

Neither Mr. Judson nor Mr. Tenney contradict this, though their testimony is vague, and Mr. Walker's testimony is clear and positive on the point.

The next exception is as follows :

"Thirteenth. For that the said master finds, that with reference to the payment of \$10,000 in bonds to the said Edwin Walker for becoming surety upon the bond of indemnity to the Chicago & Eastern Illinois Railroad Company was a fair and reasonable compensation for so doing is erroneous, because there is no evidence to support said finding, and because the said allowance, so made by the said master, is not a proper allowance to be so made, and not warranted either by the law or evidence as a proper charge against the said Chicago, Danville & Vincennes Railroad Company."

In so far as this exception is based on the statement that there is no evidence in the record to show that this was a reasonable compensation, it is obviously untenable. All the facts and circumstances were shown in evidence, and even if no witness testified as to what was a reasonable compensation to Mr. Walker, this was a question of fact, first for the master, and afterward, on a proper exception, for the court. Therefore on this point the exception must fail. In so far as it asserts that this allowance is not warranted by law, that is a proper exception; but in determining it the facts must be taken to be as found by the master; and as he finds this was a reasonable allowance for the service rendered and risks incurred there can be no question that on this finding of fact the conclusion of law was proper.

The assertion that it is not warranted by the evidence is formally insufficient, for the reason so often referred to. The facts, however, are plain, and fully warrant the master's finding. The officers of the Eastern Illinois company absolutely refused to perform their agreement with Mr. Judson.

Unless they did, nothing would be realized, either for him, appellee, the bondholders, or this appellant, to claim. Mr. Walker finally gave the Eastern Illinois his bond for \$150,000, conditioned to indemnify them in this transaction. He assumed this great obligation at a critical moment, when no one else, satisfactory to the Eastern Illinois, was willing to do so, and thus made it possible to secure performance on the part of that company. Ten thousand dollars was not unreasonable for such a service and such a risk. He had absolutely no one to look to for indemnity in respect of his liability thus incurred.

The next exception is as follows:

Fourteenth. For that the said master has found that the said Edwin Walker paid from the sum of \$127,000 so received by him of the assets of the said Chicago, Danville & Vincennes Railroad Company, the sum of \$10,000 to certain and various solicitors for services rendered to and for him, the said Walker, the sum not being a proper charge, allowance or disbursement by him or otherwise for and on account of the said Chicago, Danville & Vincennes Railroad Company or otherwise, and furthermore, that the said Edwin Walker had not filed or exhibited any itemized account of or vouchers for said expenditures.

This exception in no way refers to the evidence nor to any disputed question of fact except in its reference to failure to file or exhibit an itemized account or vouchers. Certainly the failure to file or exhibit an account or vouchers would not warrant the master in disregarding an item proved by other evidence. The exception, therefore, challenges the ruling of the master only in matter of law. Inasmuch as there is no suggestion that this payment to distinguished counsel was excessive, and as their services were rendered substantially in behalf of the Danville company, as associates of Mr. Walker, there is nothing in this exception. The report in substance holds that these payments were made to counsel associated with Mr. Walker in behalf of the railroad, and the evidence accords with this. But whether such a conclusion is warranted by the evidence



is a question not in any way raised by this exception unless this court can say that an itemized account or vouchers not appearing, no such conclusion could possibly be reached on other evidence. The exception misstates the report in so far as it alleges that the master found this payment was for services rendered to Mr. Walker.

The last two exceptions are as follows, and are grouped together, as they are both so clearly ineffective for any purpose that it is not necessary to discuss them further :

“Fifteenth. For that the said master has allowed the said Edwin Walker a credit of \$2,000 received by him in bonds, instead of coupons thereof, which is no proper credit.

Sixteenth. For that the findings of the said master are contrary to the evidence and to law and equity.”

If the exceptions filed are formally sufficient, then the sixteenth is all that would have been necessary. It is but slightly more obnoxious to the true rule than those which precede it.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The statutory law of this State has been always, in substance, what it is now—that courts having chancery jurisdiction are to proceed “according to the general usage and practice of courts of equity” in particulars not regulated by statute, or rules established by the judges of the respective courts, “consistent with the practice of courts of chancery, in cases not provided for by law.” Secs. 1 and 2, Ch. 22, Chancery.

Thus the general usage and practice of courts of equity, in particulars not otherwise regulated by statute or rule, is a part of the law of the State, established by legislative enactment, and so treated by the Supreme Court at an early date. *McClay v. Norris*, 4 Gil. 370.

And in that case the books of practice are cited with approval, showing that “there is no question of law or equity, or disputed fact or facts, which a master may not

have occasion to decide upon, or respecting which he may not be called upon to report his opinion to the court."

But the usage and practice did not warrant sending the witnesses before a master, to be there examined and cross-examined by the solicitors of the parties, merely that the testimony might be reported by the master to the court. The mode in which the evidence should come before the court is described in the case cited.

Then came the act of February 12, 1849, which provided that in chancery "the evidence on the part of either plaintiff or defendant may be given orally, under the same rules and regulations as evidence in cases at common law," which enactment has, in substance, continued in force to this day. Sec. 38, Ch. 51, Evidence.

The right to put in oral testimony under this statute was rigidly guarded. *Maher v. Bull*, 39 Ill. 531.

Still this statute was held not to abrogate the former law that a decree in chancery, giving relief—or denying relief where a ground for it is shown—must be justified by what appears in the record, or it will be reversed on appeal. *White v. Morrison*, 11 Ill. 361.

And it was there held that the evidence justifying the decree might be stated in the decree, in a bill of exceptions, in a certificate of the judge, or in a master's report. That was before the days of typewriters; nor was stenography resorted to so freely as of late. A practice grew up prompted partly by the greater convenience in appearing from time to time before a master, than to go through a case on one continuous hearing before the court, and partly by the general willingness of lawyers to have somebody else do the work—a practice of which an instance may be seen in *Grob v. Cushman*, 45 Ill. 119, of referring a cause to a master to hear and report the evidence.

By the Revised Statutes of 1872, Sec. 39, Ch. 22, Chancery, that practice received legislative sanction, with the addition that the master might be required to report his conclusions thereupon, whether of fact or law, or both, the statute saith not.

By construction, however, a reference, since the statute,

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has a much greater effect than it had under the former practice; for whereas a party might introduce under that practice, further evidence on the hearing before the court, except in a case of accounting (case last cited), now, upon such a reference, all the evidence must be put in before the master. *Cox v. Pierce*, 120 Ill. 556.

In all this course of legislation and decision, there is no hint that the usage and practice as to reviewing the proceedings before the master, was in any particular changed. Whatever that usage and practice was, it still has the force and effect of positive law, because the legislature has so enacted.

Now what was, what is, that usage and practice? If the master has not followed the terms of the reference to him the remedy is not by excepting to his report, but a special application should be made for some sort of order to have the irregularity corrected. *Deimel v. Parker*, 59 Ill. App. 426, citing *Tyler v. Simmons*, 6 Paige 127.

If he has reported the facts correctly, with a wrong legal consequence, no exception is necessary; the question may be opened without. 2 Dan. Chy. 1310; 1 Barb. Chy. 553.

But if his conclusions of fact are questioned, then, to review them, exceptions must be taken. And because of the many instances before us in which the usage and practice of courts of equity in relation to such exceptions has been disregarded, I propose to define or describe that usage and practice, so far as relates to taking accounts before a master, with so much of detail and reference to authority that a wayfaring man may know, if he will, what it is. That it is no new question here, see *Minchrod v. Ullman*, 60 Ill. App. 400, and *Williams v. Lindblom*, *Ibid.* 465.

And first, if accounts to be taken in the course of a chancery case are difficult or complicated, they must be referred to a master—not because of any statute—but by usage and practice.

Sec. 39, Ch. 22, has no relation to taking accounts.

The master must always have reported his conclusions on accounts. The parties can not put the labor upon the

court; and if the court assumes the labor, it is error. *Mosier v. Norton*, 83 Ill. 519; *Beale v. Beale*, 116 Ill. 292.

The master should require the parties first to state their own accounts, so that the evidence may be confined to disputed items. *Patterson v. Johnson*, 113 Ill. 559; 2 Dan. Chy. 1222.

In some cases the court will order an account to be prepared by a party complainant with his bill, so that the proceedings shall be in reasonable form in case of an appeal. *Morgan v. Morgan*, 48 N. J. Eq. 399.

The master having stated the account, and given notice to the parties that he has prepared a draft of his report, either party may, before the master, object to any conclusion of the master. If the master adheres to his conclusions, the party may renew his objections, as exceptions, before the court, to the same conclusions. It is at this stage that the proceedings in so many cases become irregular and abortive.

It has become common here to refer chancery cases, under the section adopted in 1872, to a master to take and report evidence, with his conclusions. He reports his conclusions and all the evidence, with no other order or arrangement than the order of its introduction before him; no statement of where (in frequently several hundred pages) the evidence relating to any one of his conclusions is to be found. Upon this the party excepting expects the court to review all the evidence, pick out the part touching each item excepted to, and thus in effect to take from the labor, which the master performed for the ease of the court, all its usefulness.

An unguarded remark in *McClay v. Norris*, 4 Gil. 370, that, upon the hearing of the exceptions, "the whole evidence is brought forward and passes in review before the court," has been regarded as embracing the whole law upon the subject. The court there was speaking to no question before the court. The sentence quoted, to be accurate, needs the insertion after the word "evidence," of some words equivalent to "upon which the master found the conclusion excepted to."

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In *Brockman v. Aulger*, 12 Ill. 277, it is said, *apropos* again, of nothing before the court, "when exceptions (objections) are disallowed by the master, if the excepting party desires it, he sends up the exceptions disallowed, together with all the evidence relative thereto, when the exceptions stand for hearing before the court." Upon what evidence a master found any one conclusion, can be known and stated only by himself, and without a statement by the master the court can not know whether it is reviewing the master or exercising original jurisdiction.

To review his conclusion, the court must have a definite statement of the ground he stood upon. Thus, in *Mayhew v. Brettingham*, *Cooper's Chancery Reports*, 43, the Lord Chancellor *Cottingham*, on appeal, referred back to the master a report upon an accounting "to state on what evidence and grounds he allows or disallows any of the charges and discharges complained of by the exceptions taken to his report." Such a reference can not be made by this court. That appeal was in effect a rehearing of the case; here an appeal is only for the correction of errors. 2 Dan. Chy. 1459.

And so, though as before shown, the statement by the court of a complicated or difficult account is error, yet if done by stipulation of the parties, the decree will be affirmed without examination. *Riner v. Tonslee*, 62 Ill. 266.

And this practice of requiring the master to state specifically the evidence relating to the conclusions excepted to, has been in several instances, in terms approved by the Supreme Court. *Hurd v. Goodrich*, 59 Ill. 450; *Prince v. Culter*, 69 Ill. 267; *Pennell v. Lamar Ins. Co.*, 73 Ill. 303.

Seventy years ago the practice and the reason—nay, the necessity—for it were thus stated by Chief Justice Marshall in *Harding v. Handy*, 11 Wheaton, 103. "It may be observed, generally, that it is not the province of a court to investigate items of an account. The report of the master is to be received as true when no exception is taken; and the exceptions are to be regarded so far only as they are supported by the special statements of the master, or by evidence which ought to be brought before the court by a

reference to the particular testimony on which the exceptor relies. Were it otherwise—were the court to look into the immense mass of testimony laid before the commissioner—the reference to him would be of little avail.”

In *Greene v. Bishop*, 1 Clifford 186, Judge Clifford adopts the doctrine of Judge Story in *Donnell v. Columbian Ins. Co.*, 2 Sumn. 366, in which case Judge Story says: “The evidence which furnishes the ground of the exceptions should be required, by the party excepting, to be stated by the master; for otherwise the court will not wander at large into the evidence in order to ascertain whether, by possibility, the master was wrong in his conclusion or not.” In different phrase the Supreme Court of Alabama, in *Alexander v. Alexander*, 8 Ala. 796, lays down the same rule. “It is too much to ask of the court to grope through a vast mass of testimony and documentary evidence in search of error which is alleged to exist somewhere, and by connecting in this instance, the accountant with the judge, to ascertain what the error is.” The court goes on to say that it was the duty of the dissatisfied party to except to such items as he considered improperly charged, and it would then have been the duty of the master to certify the evidence by which the disputed item was sustained. In all these cases the whole evidence before the master must have been before the court, else the court would have had no field to “grobe” and “wander” in.

A master’s report, not excepted to, is sufficient to found a decree upon. *Hurd v. Goodrich*, 59 Ill. 450. And exceptions which are futile are no better than none.

I must stop, not for want of material, but because time and space will not permit me to exhaust it. I refer, however, to *Mahone v. Williams*, 39 Ala. 202, as the most complete case upon the subject.

This is a bill by a judgment creditor of the Chicago, Danville and Vincennes Railroad, and the object sought by it, is to reach the proceeds of some bonds which the appellant claims should be applied to the satisfaction of his judgment.

There was a reference to a master, and upon that refer-

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ence the object of the complainant was to fix a liability upon the appellee, for a large amount of such proceeds. The report of the master occupies nineteen pages of this record, and the evidence which accompanied it, more than six hundred; brought in without other arrangement or order than that of its introduction before the master, and without reference in the report to any place where any of the evidence, for or against any of the conclusions of the master, could be found.

To that report the complainant put in before the master, as objections, and renewed before the court as exceptions, what is stated in the abstract, thus:

“First. For that the master erred in finding Edwin Walker only received \$4,000 per year as counsel for receiver. Evidence that it was \$4,800 per year.

Second. Erred in finding his retainers only covered consultation, advice, etc., and (third) in finding that his retainer was not to prosecute and defend suits, and also erred in not finding that Walker was paid for all services performed by him, exclusive of those in foreclosure case, and (fourth) that said payments of moneys by the receiver did not cover services in relation to intervening petitions.

Sixth. For that said master finds that \$85,000 is a fair and reasonable compensation for the services performed by said Walker for the Chicago, Danville & Vincennes Railroad Company and (seventh) for that said master has not found what is the usual and ordinary compensation for such services as were rendered by said Walker.

Eighth. For that such finding is not in accordance with the order of reference herein, and is not the usual and ordinary compensation paid for such services, but is far in excess thereof, and is exorbitant, unreasonable, inequitable and unconscionable.

Ninth. For that the master has found that said Walker's expenditures were \$20,000 when he filed no itemized account thereof or vouchers therefor, and (tenth) that the same were not proper expenditures.

Eleventh. For that said master has found that no credit

should be made by the said Walker or charge to him for the property known as the Chittenden farm, conveyed to him, and (twelfth) which he sold for \$24,000 which should have been found to be in full payment of all the expenditures made by said Walker on account of said road, or litigation.

Thirteenth. For that the same master finds that the payment to said Walker of \$10,000 for becoming surety upon a bond of indemnity was a fair and reasonable compensation for so doing. Such finding not warranted by either the law or evidence as a proper charge.

Fourteenth. For that said master allows the said Walker \$10,000 for moneys paid to certain solicitors, which is not a proper charge or allowance. No vouchers therefor.

Fifteenth. For that said master allowed said Walker \$2,000 in bonds instead of coupons which had been cut off, and which is no proper credit.

Sixteenth. Because said findings are contrary to the evidence, and to law and equity. Therefore complainant excepts."

The only question in this case is, whether the Circuit Court erred in overruling those exceptions.

That the court might have taken the course pursued in *Mayhew v. Brettingham*, *Cooper's Chancery Reports*, 43, may be conceded, and yet the not doing so when not asked, is not error; but to sustain the exceptions would have been to disregard that usage and practice which I have attempted to show has the force and effect of statute law.

It is idle to say that "it is the lack of evidence to sustain the master's report that justifies the exceptions, one and all. It was impossible to point out what does not exist." The less evidence there may be to sustain the report, the more quickly and briefly might the master have stated it, and the more clearly would the lack have appeared.

There is no error, and the decree dismissing the bill of the appellant is affirmed.



Taylor v. Brougham.

Esther E. Taylor v. Thomas B. Brougham, Trustee,  
John Guerin and City of Chicago.

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108	277

1. NOTICE—*Of Redocketing Suits.*—Under section 84, chapter 110, R. S., entitled "Practice," ten days notice must be given to the adverse party or his attorney of redocketing a suit reversed and remanded from the Supreme or Appellate Courts.

**Foreclosure Proceedings.**—Error to the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1896. Reversed and remanded. Opinion filed March 31, 1896.

PEASE & McEWEN, attorneys for plaintiff in error.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This is a writ of error to the Superior Court of Cook County complaining of a decree of foreclosure of a trust deed, securing the payment of certain notes, entered in said court on June 26, 1895, and is the second time the case has been before this court.

The case below was a bill in chancery filed March 19, 1894, by Thomas B. Brougham, trustee, against plaintiff in error and others, to foreclose a mortgage, alleging that the interest and principal of the notes were due and unpaid; that the mortgage provided that in case of default in such payment the owner of the notes should have the right to foreclose, and be entitled to recover a solicitor's fee; and alleging that the complainant had elected to foreclose and that the bill was brought by said Brougham for such purpose. Default was taken against the plaintiff in error, Esther E. Taylor, some days before the expiration of the rule for her to plead or answer.

A decree of foreclosure was entered November 22, 1894, from which decree Esther E. Taylor prayed an appeal to the Appellate Court. Appellees in such appeal came into court on May 29, 1895, and confessed errors and moved the court to reverse and remand the cause, which was accordingly done.

On the 10th day of June, A. D. 1895, a certified copy of the order of this court, reversing and remanding said cause, was filed with the clerk of the Superior Court, and on the same date the Superior Court entered an order containing the following language: "On filing a mandate from the Appellate Court, and on motion of the complainant's solicitors, it is ordered that this cause be and the same is hereby redocketed and reinstated in this court," and also ordered a reference of the cause.

Only two days notice of the order, redocketing the cause, or of the filing of the mandate, was given.

The Superior Court erred in entering said order redocketing the cause on only two days notice, when the law requires ten days notice. Neither the plaintiff in error, Esther E. Taylor, nor her solicitors appeared in said cause thereafter. Evidence was taken before master in chancery Stein, a report made and a decree entered June 26, 1895.

Section 84 of the practice act is as follows:

"When any cause or proceeding, either at law or in chancery, is remanded by the Supreme Court or Appellate Court, as the case may be, for a new trial or hearing by the court in which such cause was originally tried, the Supreme Court or Appellate Court, as the case may be, shall issue its mandate reversing and remanding such cause directed to such trial court, and upon a transcript of the order of the Supreme Court or Appellate Court, as the case may be, remanding the same, being filed in the court in which said cause was originally tried, and not less than ten days notice thereof being given to the adverse party or his attorney, the cause or proceeding shall be reinstated therein. In case of non-resident parties, or parties who can not be found, so that personal notice can not be served upon them, the notice may be given as in cases in chancery, or as may be directed by the court." 3 Starr & Curtis, 979, Chap. 110, Par. 84.

The statute has been construed in *Austin v. Dufour*, 110 Ill. 84, and *Miller v. Glass*, 10 Ill. App. 180. Ten days notice is indispensable.

The decree of the Superior Court is reversed and the cause remanded.

**Charles H. Stone et al. v. William Burry et al.**

1. **FINAL ORDER**—*What is not.*—An order of court adjudging a resident of another State in contempt, that he appear for punishment and that a warrant issue forthwith to bring him before the court, is not a final order.

**Contempt of Court.**—Error to the Circuit Court of Cook County; the Hon. MURRAY F. TULLEY, Judge, presiding. Heard in this court at the March term, 1896. Dismissed. Opinion filed March 31, 1896.

DOW, WALKER & WALKER, attorneys for plaintiffs in error.

A court has no power to enter an order or decree affecting the rights of any parties unless the court has jurisdiction, not only of the subject-matter, but also of the parties. If either is wanting, the whole proceeding is *coram non judice*. Miller v. Glasson, 14 Ill. App. 177; Johnson v. Johnson, 30 Ill. 215; Campbell v. McCahan, 41 Ill. 45; Sercomb v. Catlin, 128 Ill. 556.

The special appearance on the part of the respondents and answer filed by their attorneys gave the court no jurisdiction; for a special appearance denying the jurisdiction of the court does not confer jurisdiction where none existed. Graves v. Whitney, 49 Ill. App. 435.

The court had no jurisdiction to enter the order compelling the non-resident officers of the defendant corporation to come to Chicago and testify. The statute requires that a subpoena should be issued by the commissioner before whom a cause is pending, and that the witnesses should be tendered their proper fees and expenses, before they are bound to appear and testify. Chapter 51, R. S., Secs. 36, 37.

In the absence of the requirements of the statutes, they are not bound to appear, and on their failure so to do they will not be punished for contempt of court. Bonner v. The People, 41 Ill. App. 628.

CHARLES S. WILLISTON and LORENZO C. BROOKS, attorneys for defendants in error.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

Great questions of international, or at least of interstate law, are involved in this case which we are prevented from enlightening the world upon by the fact that there is no final order in the case in the Circuit Court.

After several findings the court "ordered, adjudged and decreed that" the plaintiffs in error "are in contempt of this court and that they each appear before this court to be punished according to law, and that a warrant issue forthwith to bring them, and each of them, before this court to be punished according to law."

As they were, and during the whole pendency of the suit had been, residents of New York, notified there to obey the court here, and as the warrant issued from the court here can not be executed in New York, the probability that they will appear to be punished is not great.

That the order complained of is not final, see *Lester v. Berkowitz*, 125 Ill. 307. The writ of error will be dismissed.

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### Angie Traeger v. The Mutual Building and Loan Association et al.

1. **REDEMPTION—*The Right is Absolute.***—Section 18, Chapter 77, R. S., entitled Judgments, Decrees and Executions, gives the right of redemption from judicial sales of real property, and no person can be deprived of such right against his will.

2. **SAME—*How Effected.***—A person entitled to redeem has an absolute right to deposit the proper redemption money with the officer who made the sale, and having done so, the redemption is effected, but such deposit must be made within the time allowed by the statute for redemption.

**Bill to Redeem.**—Error to Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed March 31, 1896.

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Traeger v. Mutual Building & Loan Ass'n.

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## STATEMENT OF THE CASE.

Mrs. Traeger, then Mrs. Page, in 1885, purchased block 22, in question, of James W. Brockway. On March 1, 1886, she obtained a loan of \$2,700 of the Mutual Building and Loan Association, of Chicago, and gave a bond for \$5,400 and a mortgage on said block 22, to secure the same to said building association; she actually received of said association only about \$1,800.

Said association obtained, on January 22, 1889, a decree finding \$3,515.88 due on said mortgage, and directing its foreclosure.

Sale under said decree was made February 23, 1889, and Samuel T. White was the purchaser for the sum of \$3,680, and certificate of sale of that date was issued to him.

Mrs. Traeger, then Mrs. Page, and her husband, after making said mortgage, on June 22, 1886, conveyed said premises to Howard S. Prescott, but for the benefit of plaintiff in error. By her direction Prescott, on June 1, 1887, conveyed said premises to Oliver S. Patch, Jr., the brother of plaintiff in error, which conveyance was also for her benefit. In November, 1887, plaintiff in error gave her note to the Racine Wagon and Carriage Company for \$640.33, due in one year, for merchandise purchased of said company; and, by the direction of plaintiff in error, her brother, Patch, conveyed said block by deed dated November 5, 1887, recorded January 4, 1888, to Darius J. Morey to secure said note. Morey was an agent and employe of said company, and said deed was absolute in form.

In January, 1888, Morey left the employ of said company and it took a deed from him of said block, dated January 20, recorded January 24, 1888.

In November, 1888, the Racine Wagon and Carriage Company demanded of Mrs. Traeger payment of the note; she did not pay it.

The Racine Carriage and Wagon Company, by deed dated February 20, 1889, recorded March 30, 1889, conveyed said block to Roland R. Landis, and Landis, by deed dated April 6, recorded April 12, 1889, conveyed said block to Samuel T. White, who held the master's certificate under the fore-

closure sale, dated February 23, 1889. Such deeds were absolute in form.

It is charged in said bill that White was an officer of said building association, acquainted with the rights of Mrs. Traeger in the premises, and holds the title which he obtained to said bill in privity with said association.

That plaintiff in error did not know of the conveyance of said block by Morey to the carriage company till several months after said decree of foreclosure, and did not learn of the deed from the carriage company to Landis, and of the deed of Landis to White, until plaintiff in error sought to redeem from said foreclosure sale, at which time White said that he had purchased the outstanding title, and would not receive money tendered, and would not permit or allow her to redeem.

That during all the time of the making and recording of all said deeds she was in possession of said block, and that all said deeds were made and received by the several parties making and receiving the same, with full knowledge on the part of the grantors and grantees in each of said deeds of her rights in the premises, and were the result of a conspiracy on the part of the carriage company, Landis and White, to defraud plaintiff in error of her right of redemption from said foreclosure sale, and from the conveyance made to secure said note to said carriage company.

Upon demurrer to the bill, the same was dismissed.

MATTHEWS & HUGHES, attorneys for plaintiff in error.

M. L. RAFTREE and BOWEN W. SCHUMACHER, attorneys for defendants in error.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The bill of the plaintiff in error, condensed, is that, having had her property sold under a foreclosure sale, and being entitled to redeem therefrom, the defendant, White, has purchased a second mortgage made by her, in form an absolute deed, and refuses to permit her to redeem. Nei-

Schmitt v. Devine.

ther Mr. White nor any of the defendants to her bill, had any power to prevent her redeeming from the foreclosure sale of her property. The statute, section 18, chapter 77, gave to her a right of redemption which no one could, against her will, deprive her of. It was not necessary that Mr. White, or anybody else, should consent to her redeeming, or to take money she offered. She had an absolute right to deposit the proper redemption money with the master who made the sale, and thereby a redemption would be effected.

If plaintiff in error has failed to avail herself of this plain right of redemption, it is not the fault of Mr. White or anybody else. No bill to obtain the right of redemption was necessary or proper.

If the absolute deed by her made to Howard S. Prescott, and that by her direction made to Oliver S. Patch, Jr., were in trust for her benefit, and the absolute deed by Patch to Morey was but a mortgage, and if White, when he purchased and received a deed from Landis had notice of this, she may be entitled to maintain a bill against White to redeem from the alleged mortgage to Morey; but her alleged right to redeem from a mortgage to Morey did not and does not extend the time within which she had an absolute right to redeem from the foreclosure sale made by the master in chancery.

It is for an extension of such statutory time, an enlargement of the plain right given her by the law, that her bill was filed, and it was properly dismissed.

The decree of the Superior Court is affirmed.

**F. J. Schmitt v. J. M. Devine et al., for use of United States Heater Co.**

1. **STATUTES CONSTRUED—Return of Legal Process.**—The meaning of the words "returnable at the next term," in Section 8, Chapter 62, R. S., entitled "Garnishment," is the next term to begin in not less than ten days.

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2. **GARNISHMENT**—*Personal Service of Scire Facias Imperative.*—Personal service of a *scire facias* upon a garnishee is imperative in order to authorize a final judgment against him.

3. **ATTACHMENT BOND**—*Defective, Does Not Render the Proceeding Void.*—An attachment bond being amendable under Section 28, Chapter 11, R. S., entitled "Attachments," no defects in it will render the proceeding void.

4. **ATTACHMENTS**—*What Defects May be Urged by a Garnishee.*—It is a general rule that anything amendable is not void, and it is only defects in the proceedings against the original defendants in attachment proceedings which render them void, that garnishees may urge.

5. **WAIVER**—*Of Errors Assigned.*—Where a matter is assigned as error, but is not mentioned in the brief of the party assigning it, it will be considered as waived.

6. **ABSTRACTS**—*Observance of Rules Relating to, Required.*—This court, owing to the amount of business before it, requires the observance of the rule as to abstracts.

**Attachment and Garnishee Process.**—Error to the Superior Court of Cook County; the Hon. JAMES GOGGIN, Judge, presiding. Heard in this court at March term, 1896. Affirmed. Opinion filed March 31, 1896.

LOEB & ADLER, attorneys for plaintiff in error.

ALLEN & BLAKE, attorneys for defendants in error.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

Attorneys should remember that this court has, when it takes up one of their cases for consideration, no previous knowledge of what the case is about, and is to derive its knowledge of the case itself from the abstract, and that only.

The abstract in this case does show that interrogatories for garnishees, of whom the plaintiff in error was one, to answer, were addressed, so far as relates to him, with wrong initials for his given names; but as he was served both on the original attachment and the *scire facias*, in which were his right initials, and to neither of which did he pay any attention, he could not have been prejudiced by the mistake, and it is no ground for reversing the judgment. Had he objected below the mistake could easily have been rectified.



The abstract does not show in what form either the conditional or final judgment against him is in, or whom it is in favor of; but it does show that it was rendered March 27, 1895, upon *scire facias* dated January 30, 1895. Whether that judgment was by default, or upon appearance, and saying nothing in answer to the *scire facias*, does not appear by the abstract.

The judgment is to be presumed correct if it may be without contradicting the record, as shown in the abstract.

That the *scire facias* was returnable to the March term was no error. True, the February term was literally the next term after the date of the writ, but that term would begin in five days thereafter, and the meaning of the words in Section 8, Chapter 62, Garnishment, "returnable \* \* \* at the next term," is the next term to begin in not less than ten days. Personal service of the *scire facias* is imperative to authorize a final judgment against a garnishee. *McCourtie v. Davis*, 2 Gilm. 298.

The law does not require a vain thing, and as the garnishee could not be required to appear at any term unless he had been served with the *scire facias* not less than ten days before the beginning of that term, it would have been useless to make the *scire facias* returnable to a term that would begin in five days.

These are the only alleged errors we can consider except an objection made to the attachment bond, but that being amendable—Sec. 28, Ch. II, Attachments—no defect in the bond would render the proceeding void. It is a general rule that anything amendable is not void, and it is only defects in the proceedings against the original defendants which render them void, that garnishees may urge. *Dennison v. Blumenthal*, 37 Ill. App. 385; same case under title *Dennison v. Taylor*, 142 Ill. 45.

If there be any assignment of error which raises the question whether the judgment was prematurely taken, such question is not alluded to in the brief of plaintiff in error, and is therefore waived. *Cook v. Moulton*, 59 Ill. App. 428.

Errors in the record, but not shown by the abstract, are not visible. It is a subject of complaint that this court requires an observance of the rule as to abstracts. The amount of business here is our justification. *Kellogg v. McClellan*, 62 Ill. App. 636; *Klaas v. John Kauffman Brewing Co.*, 63 Ill. App. 319.

Thirty-six years ago the Supreme Court endeavored to compel observance of this rule by a threat. *Kelleher v. Tisdale*, 23 Ill. 405.

Four years later that court, without executing, repeated the threat. *Shackelford v. Bailey*, 35 Ill. 387.

So the judicious mother secures the obedience of her wayward children. *Johnson v. Bantock*, 38 Ill. 111.

The judgment is affirmed.

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### Adolph Kadlowsky v. Emma Kadlowsky.

1. **HUSBAND AND WIFE**—*Husband's Obligations Pending Divorce Proceedings*.—The husband is under obligation to maintain his wife pending proceedings for divorce instituted by her, but it does not follow if he is unable to do so he can be confined in jail because of his failure.

2. **CONTEMPT OF COURT**—*Husband in Default of Paying Alimony*.—Although a husband, defendant in a proceeding for divorce, is ordered by a court to pay alimony, it is not a contempt to fail to pay, if, without fault, he is unable to do so.

**Proceedings for Contempt**.—Failure to pay alimony. Error to the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the March term, 1896. Reversed. Opinion filed March 31, 1896.

#### STATEMENT OF THE CASE.

In a suit for divorce, brought by defendant in error on January 21, 1895, an order was entered requiring the defendant to pay to the complainant the sum of \$5 per week temporary alimony, and the sum of \$25 to her solicitors, as solicitor's fees. On August 31, 1895, the unpaid alimony amounting to \$90, the court entered an order reciting that the sum of \$90 was due, and requiring the defendant to pay the same on or before September 10, 1895.

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Kadlowsky v. Kadlowsky.

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On September 30, 1895, the court amended the order of August 31, 1895, which fixed the amount of the alimony due at \$90, so as to make the \$90 payable to the clerk of the court, instead of to the complainant. On the same day, September 30, 1895, the court entered the order committing the defendant to jail for failure to pay the said sum of \$90, and provided in the order that a certified copy of the same should serve as a mittimus to the sheriff.

The plaintiff in error sued out this writ of error to reverse the order committing him to jail.

C. E. CRUIKSHANK and FRED H. ATWOOD, attorneys for plaintiff in error.

Mere inability to pay is no reason why a man should be imprisoned. The contempt can exist only upon a willful refusal to pay when a man is able. *Blake v. The People*, 80 Ill. 11.

Our constitution, Sec. 12, Article 2, provides: "No person shall be imprisoned for debt unless on refusal to deliver up his estate for the benefit of creditors." In view of this provision the court can not imprison for failure to pay a money decree. *Goodwillie v. Millman*, 56 Ill. 523; *Dinet v. The People*, 73 Ill. 183; *Blake v. The People*, 80 Ill. 11.

This case is in reality a civil proceeding, although carried on in the form of a contempt matter.

The attachment for this species of contempt, the disobedience of an order to pay money, is to be looked upon as a civil execution for the benefit of the injured party, though carried on in the shape of a criminal process for a contempt of the authority of the court. *Buck v. Buck*, 60 Ill. 105; *Sharness v. Joy*, 41 Ill. App. 157.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Upon the hearing of the rule to show cause why the defendant in the divorce proceeding should not be attached for contempt in failing to comply with the order of the court as to the payment of alimony, it appeared that five months

previous the complainant departed with her two children for Germany, where she has since remained; that the defendant was unable to earn more than eight dollars per week, and was indebted for money borrowed to enable him to commence housekeeping when complainant, after filing her bill for divorce, came back to him; that he has no money save five dollars which he had paid to the clerk of the court, in compliance with its order, nor has he any property save some incumbered real estate which he can not sell unless the complainant will join in a deed thereof, which sale he offers to make and pay the alimony if she will join in a deed.

The obligation of a husband to maintain his wife in Europe pending proceedings for divorce, instituted by her, may be conceded, and yet it does not follow that a husband unable so to do can be confined in jail because of a failure to so maintain.

To the wife in Europe, the imprisonment of her impecunious husband in jail in Chicago, might be gratifying, but in no other way can such incarceration be useful to her. Although ordered by a court to pay, it is not contempt of court to fail to pay what one is, without fault, unable to pay. *Blake v. The People*, 80 Ill. 11; *Wightman v. Wightman*, 45 Ill. 167; *Schuele v. Schuele*, 57 Ill. App. 189.

The order of commitment to jail is reversed.

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### Gleason and Bailey Manufacturing Co. v. John G. Hoffman.

1. *EQUITY PRACTICE—Remedy at Law—Waiver of the Right to Object.*—When a general demurrer to a bill in chancery, for an account, is overruled, and the defendant answers, and not only says nothing about the remedy being at law but prays for a money decree in his own favor, objection to equity jurisprudence is waived.

2. *SAME—Objections to the Master's Report.*—Where the report of the master does not follow the directions of the submission, objections must be made in the court below by an appropriate motion.

Gleason & Bailey Mfg. Co. v. Hoffman.

3. EXCEPTIONS TO THE MASTER'S REPORT—*Must be Specific.*—Exceptions to the report of the master must be specific and must point out the evidence upon which they are based. *McMannomy v. Walker*, 68 Ill. App. 259.

**Bill for an Account.**—Error to the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed March 31, 1896.

WALKER, JUDD & HAWLEY, attorneys for plaintiff in error.

"Whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury," a right guaranteed by all American constitutions. *Buzzard v. Houston*, 119 U. S. Reports, 347-355; L. Ed. Book 30, page 451-453; *Gore v. Kramer*, 117 Ill. 182.

"Where, in and of itself, the claim is in its nature essentially of a legal character, as is a cash or money claim, some substantial and well defined ground of equity jurisdiction must exist, such as the enforcement of a lien as security for the cash claim, the necessity for discovery, the necessity for an accounting too complicated for a jury in a trial at law, etc. But, in the language of Chief Justice Marshall, 'this rule can not be abused by being employed as a mere pretext for bringing causes proper for a court of law into a court of equity.'" *Russell v. Clark*, 7 Cranch 89.

Neither can this bill be maintained on the ground of discovery, because it neither alleges that the proof can not be got except in a court of equity, nor do the facts so show Story's Equity Jurisprudence, Sec. 74.

DOW, WALKER & WALKER, attorneys for defendant in error.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

September 16, 1895, the appellant made an agreement with the J. G. Hoffman Manufacturing Company, of which

the appellee was substantially "the whole bird," for the exclusive right to manufacture, on royalties, fan-blowers under patents belonging to the Hoffman company.

The agreement provided for its own termination, and the Hoffman company did terminate it, and assigned all its claims against the appellant to the appellee, who filed this bill for an account of what was due for royalties from the appellant to the Hoffman company.

The appellant answered, and by agreement of the parties the case was referred to a master to take the proofs and report the same, "with his opinion on the law and the evidence." He reported \$5,771.34 due to appellee.

The appellant concedes that we are not "to review the question of fact" arising before the master.

The points made by the appellant are: First, that the action should have been at law. There was a general demurrer to the bill, but when that was overruled the appellant answered, and not only said nothing about remedy at law, but prayed for a money decree in its own favor, thereby admitting that the case was properly in a court of equity, where, on a bill to account, the defendant may have relief, upon or without an answer. *Acme Copying Co. v. McLure*, 41 Ill. App. 397.

The objection to the equity jurisdiction, if ever valid, was waived. *Crawford v. Schmitz*, 41 Ill. App. 357; *Herrick v. Lynch*, 150 Ill. 283.

The second point is that though the reference "was to take evidence and report the same, together with his conclusions thereon," yet the report of the master "simply states his conclusion."

No such point was made in the Circuit Court. If a good objection, it should have been the basis there of an appropriate motion. *Deimel v. Parker*, 59 Ill. App. 426.

The third point is that the master came to a wrong conclusion upon an item in the account.

The record shows that before the master were account books, a deposition, and other papers not set out in the record. What they contained we have no means of knowing, and besides no question arises upon an exception to a

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North Chicago St. R. R. Co. v. Rosenberg.

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master's report that he "erred in allowing each item of royalty shown in report." We have wasted a good deal of time and space in endeavoring to impress lessons as to exceptions to master's reports. The last effort was in *McMannomy v. Walker*, 63 Ill. 259.

The last point is that the master took into the account several matters of charge by the appellee against the appellant, which were no part of the account which the bill was based upon.

Generally, it is true that only the matters presented by the bill can be litigated in a chancery cause. *Detroit Stove Works v. Koch*, 30 Ill. App. 328.

But in this case all the dealings between the two companies were conducted upon the basis that the appellee was the whole of his company. He gave his time and effort to the business to which the agreement related, and also dealt with the appellant in the other matters taken into account by the master.

The appellant had counter-charges against him to the amount of \$6,760.26, allowed by the master, but which had never been applied specifically to any part of the dealings between these parties.

To adjust the balance to be applied to the account which was the basis of the bill, the other items chargeable by the appellee to the appellant were taken into account to the amount of \$2,961.36.

Whether in form or not, this amount was in substance applied to the reduction of the appellant's account, which was in the nature of a set-off, as no part of it had ever been specifically applied to the royalties.

There is no error, and the decree is affirmed.

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**North Chicago Street Railroad Company v. Jacob Rosenberg.**

1. RULES OF COURT.—*Consequences of a Non-compliance with.*—For a want of compliance with the rules of this court relating to the filing of briefs and abstracts, the judgment of the court below will be affirmed.

Error to the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed March 31, 1896.

EDMUND FURTHMANN, attorney for plaintiff in error.

ISRAEL COWEN, attorney for defendant in error.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Upon an application for a supersedeas certain briefs and abstracts were submitted to the court; no others have been presented.

These briefs and abstracts are not such as the rules of this court require shall be filed upon a hearing. For want of compliance with the rules of this court the judgment of the Circuit Court is affirmed.

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### Philemon L. Austin v. People of State of Illinois.

1. TRIALS—*In Criminal Cases Without a Jury.*—A court has jurisdiction to try a person for a misdemeanor without a jury.

2. PRACTICE—*Exceptions in Criminal Cases.*—Exceptions must be taken by a person on trial for crime, or mere irregularities will be waived. The same rule applies as in civil cases.

3. WAIVER—*Of Rights by Persons on Trial for Crime.*—A prisoner on trial has no right to stand by and suffer irregular proceedings to take place, and then ask to have the proceedings reversed on error on account of such irregularities. The law allowing him counsel to defend him, has placed him on the same footing as other defendants, and if he neglects in proper time to insist on his rights he waives them.

4. PRESUMPTION—*In Favor of the Regularity of Legal Proceedings.*—Where a court has jurisdiction of the person of the defendant and of the subject-matter, it is presumed to have proceeded regularly in all it has done, and unless sufficient cause is shown in the record to rebut the presumption, its judgment must be affirmed.

Indictment, for a misdemeanor. Error to the Criminal Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed March 31, 1896.



Austin v. The People.

STATEMENT OF THE CASE.

Plaintiff in error was indicted by the grand jury, arrested, bound over for trial and appeared before the Criminal Court for that purpose on May 31, 1895. The indictment contained three counts. The first, charging assault with a deadly weapon with intent to commit murder; the second, assault with revolver; "without any considerable provocation whatsoever, and under circumstances showing an abandoned and malignant heart, did unlawfully, willfully and maliciously make an assault upon one Charles W. Swenk, then and there being, with intent then and there to inflict upon the person of," etc., a bodily injury. The third count charges assault on same Swenk with a blunt instrument.

The record shows that a jury was waived and the case submitted to the court for trial, by oral agreement, not in writing.

The trial judge found plaintiff in error guilty on the second count of the indictment, and sentenced him to pay a fine, \$300 and costs, and to stand committed until the fine is paid. Execution issued on the sentence, and he was committed to the jail of Cook county. He then brought this writ.

The motion for a new trial was as follows:

STATE OF ILLINOIS, }  
Cook County. } ss.

In the Criminal Court of said county.

The People }  
v. } Motion for new trial.  
Austin. }

And now comes the defendant by his counsel, and moves the court for a new trial in this cause. For the grounds and reasons of the said motion he adduces the following:

1st. Because the court rejected proper evidence in his behalf, to which ruling of the court he excepted.

2d. Because the court admitted improper evidence against him, over his objection, and to which ruling he duly excepted.

3d. Because the evidence in this cause shows conclu-

sively that his action in the matters complained of were justifiable.

4th. Because the evidence in this cause shows that the defendant was not guilty of any of the offenses charged in the indictment.

5th. Because the court erred in finding the defendant guilty.

6th. Because the court erred in his construction of the law pertaining to the case.

7th. Because the act complained of was induced by the wrongful acts and conspiracies on the part of the complaining witness and of others, with the evident intention of committing an unlawful act, and only sufficient force was exercised by the defendant to resist such unlawful attempt.

8th. Because of the other facts and matters appearing from the record, wherein the court erred in his findings.

9th. Because the court refused the divers findings marked "refused," asked by the defendant.

10th. Because the court found the defendant guilty, or rather because the court made the divers rulings against the defendant to which he excepted.

WILLIAM T. BLAIR, attorney for plaintiff in error.

JACOB J. KERN, state's attorney, and BURTON & REICHMANN, attorneys for defendant in error.

In this State a jury may be waived in every case, except in prosecutions for felony. The constitutional guaranty of a trial by jury extends to all cases triable at common law, both civil and criminal. Nevertheless it has always been possible to waive a jury trial, by consent of the parties, in civil cases, both under the common law and under the statute. To this extent, therefore, at least, the constitutional right may be waived. There is no statute in this State regulating the waiver of a jury in criminal cases, unless it be the recent act in question in this case. It is, therefore, held as a general doctrine, both in this and in other States, that the constitutional guaranty of a trial by jury,

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Austin v. The People.

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secures it as it existed under the common law. *Ward v. Farwell*, 97 Ill. 611; *Harris v. People*, 128 Ill. 519.

Under the common law a trial by jury was secured only in cases of felony, or in offenses of a higher degree, but did not extend to misdemeanors. It has, therefore, been held that under constitutions similar to ours the right of trial by jury extends to infamous crimes indictable at common law, and not to misdemeanors. *People v. Gusher*, 20 Barb. 652; *State v. Conlin*, 27 Vt. 319.

In prosecutions for misdemeanors a jury may be orally waived in open court, by consent of parties. *Darst v. People*, 51 Ill. 286.

See, to the same effect, *Tyra v. Com.*, 2 Metc. (Ky.) 1; *State v. Borowsky*, 11 Nev. 119; *State v. Cox*, 8 Ark. 436; *Sarah v. State*, 28 Ga. 576; *Com. v. Dailey*, 12 Cush. 80.

The only exception to the right of a defendant to waive any statutory or constitutional privilege, created for his benefit, in this State, is the power to waive a trial by jury in prosecutions for felony. *Harris v. State*, 128 Ill. 519.

One can not complain of irregularities in the proceeding where he consents, nor can he assign error thereon. *Smith v. Kimball*, 128 Ill. 584; *Garrity v. Hamburger*, 38 Ill. App. 318.

A prisoner on trial under our laws has no right to stand by and suffer irregular proceedings to take place, and then ask to have the proceedings reversed on error on account of such irregularities. The law furnishing him with counsel to defend him, has placed him on the same platform with all other defendants, and if he neglects, in proper time, to insist on his rights, he waives them. *McKinney v. People*, 2 Gilm. 556.

Exceptions must be taken below or the irregularity is waived. *People v. Perteet*, 70 Ill. 171; *Chase v. People*, 40 Ill. 356; *People v. Bulliner*, 95 Ill. 40.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The defendant was found guilty upon the second count of the indictment, which is for a misdemeanor.

A court has jurisdiction to, without a jury, find a defendant guilty of a misdemeanor. *Darst v. The People*, 51 Ill. 286.

No exception to the finding or judgment of the court, or to the order that the defendant stand committed until the fine be paid, was taken. The case is here only upon the questions presented by the motion for a new trial, and certain exceptions taken to the admission of evidence. The evidence, properly admitted, fully sustains the finding of the court; the merits of the case are with the people.

We might dispose of the alleged error in overruling the motion for a new trial, by calling attention to the rules of court which require that all matters upon which reliance is placed shall be abstracted. No abstract of such motion has been made. Without reference to such rule, we find none of the reasons assigned for granting a new trial are well urged.

Exceptions must be taken by a person on trial for crime, or mere irregularities will be waived as in the case of defendants in civil cases. *Chase v. The People*, 40 Ill. 352; *People v. Bulliner*, 95 Ill. 394; *Kelly v. State*, 132 Ill. 371; *Lawson on Presumptive Ev.*, 27.

A prisoner on trial under our laws has no right to stand by and suffer irregular proceedings to take place, and then ask to have the proceedings reversed on error on account of such irregularities. The law allowing him counsel to defend him has placed him on the same platform with all other defendants, and if he neglects, in proper time, to insist on his rights, he waives them. *McKinney v. The People*, 2 Gilm. 541-556.

It was not urged in the court below, nor is it assigned as error here, that the Criminal Court tried the case by oral consent without a jury, or that the order was made that the defendant stand committed until the fine be paid.

The Criminal Court had jurisdiction of the person of the defendant and of the subject-matter, and it is presumed to have proceeded regularly in all that it did. *Kelly v. The People*, 115 Ill. 588.

Such presumption the record here presented fails to rebut; the judgment is therefore affirmed.

**Philemon L. Austin v. The People of State of Illinois.**

1. **CRIMINAL LAW—Verbal—False Representations.**—To constitute the offense of obtaining money by false pretense, when such pretense is by verbal representations, there must be a false representation of an existing past matter.

2. **SAME—Moral Culpability Not Criminal.**—A person is not guilty of a crime where he accomplishes his purpose by means not criminal, although, morally, no less culpable.

**Indictment.**—Obtaining money by false pretenses. Error to the Criminal Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the March term, 1896. Reversed and remanded. Opinion filed March 31, 1896.

BLACK & GOODWIN, attorneys for plaintiff in error.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is an indictment for obtaining money from one John J. Zimmerman by falsely pretending to him that he, the plaintiff in error, had a saloon and restaurant of the value of \$15,000 for sale, from which the net income was from \$70,000 to \$80,000 for six months, and that the restaurant had a capacity for furnishing from 10,000 to 15,000 meals a day, upon which false pretenses Zimmerman paid to the plaintiff in error \$2,000, as part of the price of \$7,500, for one-half interest in the saloon and restaurant. No saloon or restaurant was shown, only a statement made where they were, and the parties were strangers to each other. In the language of Zimmerman himself as a witness on the trial, he "hadn't sense enough to know or go and see a lawyer and find out anything."

The negotiations were commenced by Zimmerman calling upon the plaintiff in error October 21, 1892, in response to an advertisement as follows: "For sale. One-half interest in hotel, bar and restaurant; seating capacity 8,000 per day. The buyer to manage. Small capital required. Call at Orleans Hotel or 187 Dearborn, R. 213." The only

verbal representation proved as to income was that "we would make that" (\$75,000 or \$80,000) "during the World's Fair," and as to the restaurant, that "we" could seat 15,000—could feed 15,000.

That the plaintiff in error fascinated the prosecuting witness by his ostentation of wealth, fine clothing, a fast horse, and the volubility of the plaintiff in error and his wife as to their riches, may be admitted, and yet the crime of obtaining money by false pretenses not fastened upon the plaintiff in error.

To constitute that crime there must be a false representation, when the false pretense is by verbal representation, "of an existing or past fact." 2 Bishop, New Crim. Law, Sec. 415.

That definition shuts off all consideration of what was said about the income.

The advertisement is ambiguous. Whether the seating capacity of 8,000 was of the hotel, bar and restaurant all together, or of either, and which, is not stated, and the verbal representation of 15,000 is not a representation of an existing fact, but of what could be done if guests did not stay too long.

It is only by inference that it can be extended or construed into a statement of the dimensions of the place.

A written contract was made between the parties, before any money was paid, which stated that the subject of sale was "an undivided one-half interest in the complete bar and restaurant outfit to be contained in" buildings described.

Zimmerman testified that he thought that meant "that the saloon and restaurant was there."

Difficult as it may be to believe, that a man who had been successful in the livery business for three or four years, and had been in the cattle business for five or six years, during which he came once every year to Chicago with four to eight car loads of cattle, could be so ignorant, yet it may be that he was so bewildered by the plaintiff in error, and the World's Fair fever, then so prevalent, that his ability to comprehend simple phrases was confused and obscured.

Orr v. The People.

Want of prudence and discretion on the part of Zimmerman is no excuse: 2 Bishop, New Crim. Law, Sec. 433; but he, the plaintiff in error, is not guilty of a crime that he did not commit, even if he did accomplish his purpose by means, morally, no less culpable.

The judgment is reversed and the cause remanded.

Harry B. Orr and John B. Saddler v. The People of the State of Illinois.

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1. CONSPIRACY—*What is Indictable.*—It is indictable for two or more persons to conspire to do an unlawful act by any means, and also to conspire to do any act by unlawful means.

2. SAME—*Gist of the Offense.*—The purpose in view in forming the conspiracy, does not constitute the offense. The purpose being unlawful, the conspiracy formed to effect it becomes itself unlawful and is indictable and punishable.

3. SAME—*Requisites of the Offense.*—Many acts which, if done by an individual, are not indictable, are punished criminally, when done in pursuance of a conspiracy by two or more persons.

4. MERGER—*In Criminal Offenses.*—There can be no merger of a conspiracy in the offense of obtaining money by false pretenses. Both offenses are misdemeanors, punishable either by fine or imprisonment, or both, and in such cases there can be no merger.

5. EVIDENCE—*In Criminal Cases.*—Any evidence which tends to prove the issue is competent, notwithstanding it may be injurious to the defendant and may tend to prove distinct offenses against him.

**Indictment.**—Conspiracy. Error to the Criminal Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed March 31, 1896.

W. N. GEMMILL, attorney for plaintiffs in error.

A false pretense is such a fraudulent representation of an existing or past fact by one who knows it not to be true, as is adopted to induce the person to whom it is made to part with something of value. 2 Bishop on Criminal Law, 415; Jackson v. The People, 126 Ill. 149. See also Commonwealth v. Jackson, 132 Mass. 16; Bishop v. Small, 63 Me. 1;

Mooney v. Miller, 102 Mass. 217; Heffron, 84 N. C. 751; State v. Webb, 26 Ia. 262; Smith v. The State, 55 Miss. 513; Reg. v. Williamson, 11 Cox. C. C. 328; 2 Bishop on Criminal Law, Sec. 429; People v. Blanchard, 90 N. Y. 314; Commonwealth v. Moore, 99 Pa. St. 574; State v. Tomlins, 5 Dutcher 13.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The plaintiffs in error were jointly indicted for conspiracy to obtain money, etc., by false pretenses, from one John M. Gray, and him to cheat and defraud; and upon trial by a jury were found guilty as charged, and the plaintiff Saddler was sentenced to one year in the penitentiary, and the plaintiff Orr to two years in the penitentiary. From such judgment this writ of error is prosecuted:

Neither the state's attorney nor any one else on the part of the people follows the case into this court, and we are compelled to examine, unaided, a voluminous record to determine the validity, or otherwise, of objections urged against the judgment.

According to the testimony of Gray, the prosecuting witness, he came to Chicago in May, 1893, to visit the World's Fair, and desired to make his expenses by going into some kind of business with the aid of a little money he had saved up.

The plaintiffs in error were at that time conducting a retail grocery business at No. 6148 South Halsted street, in Chicago, under the name of the Orr & Saddler Company, and were contemplating the establishment of another like business at 6855 the same street, which the court, by general knowledge, knows is a little less than one mile distant, and south from the first named location. In response to an advertisement by plaintiffs in error, inserted in a newspaper and seen by Gray, the latter wrote a letter which resulted in the plaintiff Orr calling to see Gray at his place of residence. Gray and Orr there had some conversation, concerning the details of which they disagree, but in the course of the talk, Orr invited Gray to call upon him and Saddler



at their place of business, No. 6148 South Halsted street, and Gray did so on the following morning, and there met them both.

During the period of the next fortnight or more, frequent interviews between Gray and the plaintiffs in error, either singly or alone, took place, and Gray was often at their place of business and at the proposed location of the new business, but no agreement was reached between them.

Finally, however, and a few days before the middle of June, it was agreed between them that Gray should become a stockholder to the extent of four hundred dollars in a new corporation that plaintiffs in error, together with one or two other persons, were organizing for the purpose of carrying on the contemplated new business at No. 6855 South Halsted street, and it was also agreed that Gray should be employed in such new business at a weekly salary of fifteen dollars from June 15, 1893. Gray thereupon paid to Orr the sum of four hundred dollars, and took from Orr a written agreement that he should receive eight shares of full paid stock in the corporation, when organized, and be employed as stated, and, later, Gray received the shares of stock and was given the employment, and continued in it, and was paid the stipulated salary until he was discharged on the 19th of July following.

The new corporation was organized under the name of Dainton & Company, and Orr was made its president, and Saddler its secretary. Who the directors were is not disclosed, but Gray was not one.

The business was opened before the corporation was completely organized, by the contribution of a stock of goods by Orr and Saddler, but no profits were made, and because of an indebtedness created on open account to the Orr & Saddler Company, to the amount of between five and six hundred dollars, a judgment note was given by the corporation of Dainton & Company to one to whom the account due, to the Orr & Saddler Company had been assigned, and the entire stock in trade belonging to Dainton & Company was sold under execution issued upon a judgment confessed upon said note, and the business was thus closed up.

The judgment creditor became the purchaser of the stock of goods at the execution sale, and stored them for a couple of months in the basement of the Orr & Saddler Company, and then sold them to that company for between five and six hundred dollars.

The case is argued here in behalf of the plaintiffs in error upon the theory that it is one of obtaining money by false pretenses.

But such is not the correct theory, or view, of the case.

The gist of the offense charged by the indictment is the unlawful conspiracy.

The conspiracy that is alleged had for its object an unlawful purpose, which was, to wit : The obtaining of Gray's money by false pretenses, and unlawfully him to cheat and defraud. *Johnson v. People*, 22 Ill. 314.

It is indictable for two or more persons to conspire to do an unlawful act by any means, and, also, to conspire to do any act by unlawful means. *Smith v. People*, 25 Ill. 17.

The purpose in view in forming the conspiracy did not constitute the offense. That purpose being unlawful, the conspiracy formed to effect it became itself unlawful, and was indictable and punishable.

"That many acts which, if done by an individual, are not indictable, are punished criminally when done in pursuance of a conspiracy among numbers, is too well settled to admit of controversy." *The State v. Rowley*, 12 Conn. 101.

And so it was said by Grose, J., in *The King v. Mawbey*, 6 Term Rep. 536.

"In many cases an agreement to do a certain thing has been considered as the subject of an indictment for a conspiracy, though the same act, if done separately by each individual without any agreement among themselves, would not have been illegal."

Nor was there, as argued, a merger of the conspiracy in the false pretense. Both offenses under our statute are misdemeanors, punishable either by fine or imprisonment, or both, and in such cases there can be no merger. . *Wharton's Criminal Law* (9th Ed.), Sec. 1346; 1 *Bishop's New Criminal Law*, Sec. 814.

It is not necessary to reproduce the evidence about which there was any substantial dispute. There was much of it, but we think that considered all together, it justified the conclusion reached by the jury of the guilt of the plaintiffs in error.

It is objected that it was error to admit the testimony of the witnesses Baird and Seifert concerning transactions had with them by the plaintiffs in error.

They were each induced, at about the same time, by similar advertisements and representations made by the plaintiffs in error as were employed and made to Gray, to take stock in the same proposed corporation of Dainton & Company, and receive employment in the business, and we think their evidence was properly received.

It may be regarded as settled that "any evidence which tends to prove the issue is competent, notwithstanding that it may be injurious to the defendant and may tend to prove distinct offenses against him." *McDonald v. People*, 25 Ill. App. 350; *Ochs v. People*, 124 Ill. 399.

The judgment of the Criminal Court is therefore affirmed.

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### Louis Mayer, Adm'r, v. Chicago & Alton Railroad Co.

1. **RAILROADS—Trespassers—Who are Not.**—When a railroad company blocks a highway crossing and compels persons desirous of crossing to enter upon its grounds to pass around the obstructions, or wait until they are removed, such an entry is not a trespass.

2. **SAME—Trespassers.**—Where a person is induced by the action of a railroad company to enter upon its premises, such person is not a trespasser, and does not become a trespasser until he has had a reasonable opportunity to get off of such premises.

3. **QUESTION OF FACT—Trespasser or Licensee.**—It is for the jury to say whether the relation of a person upon the tracks of a railroad is that of a licensee of the company, or a trespasser upon its tracks.

**Trespass on the Case.**—Death from negligent act. Error to the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge,

presiding. Heard in this court at the March term, 1896. Reversed and remanded. Opinion filed March 31, 1896.

#### STATEMENT OF THE CASE.

Dora Murphy was killed in the Brighton Park yards of the defendant, on the 8th day of January, 1892. She was a daughter of a former employe of the company, and had lived in the neighborhood all her lifetime. She had lived with her mother on Smith avenue, about a block west of the crossing of California avenue with the tracks of the Chicago & Alton railroad, for more than three years before her death.

It appears from the evidence that Mrs. Murphy's house was on the north side of the street, facing about twenty-seven railroad tracks, which are used in what is known as the "yards" of the C. & A. R. R. Co. at Brighton Park. The street on which it faced was a street running east and west. South of the street was an open space of ground, nearly a block wide, extending east to California avenue.

On California avenue was a shanty for the railroad switchmen to flag the crossings at this large number of tracks over California avenue. The yard extends east and west to California avenue. California avenue has been opened for public travel through the middle of defendant's railroad yard, where thousands of cars were being switched daily in making up trains of the company.

The people in the neighborhood had made a foot path on this open ground; that foot path did not cross the tracks of the company, but reached California avenue just north of a "tool house."

The decedent, Dora Murphy, was an unusually bright and intelligent girl, a little over thirteen years old, and was as big as most girls of fourteen or fifteen.

Dora Murphy undoubtedly knew that crossing the tracks was attended with danger. Passing over such a great number of tracks in hourly use is always dangerous.

The morning of January 8, 1892, was very cold, about fifteen degrees below zero. Dora Murphy left home about

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eight o'clock in the morning with some milk cans and pails to deliver milk, as usual with her, to the people living south and east of the railroad company's yards. With her and immediately behind was her sister Kate, who, with her little brother, was carrying a clothes basket. The children crossed the street in front of the house and took the foot path above mentioned eastward to California avenue, and there found that the street crossing proper was blocked by an engine and two caboose cars which extended westward over California avenue.

Instead of waiting, the children went to the west (Dora ahead) and passed around the west end of these cars. This passage was made safely, and the children kept on their way southward over the different tracks until they reached the track known as track No. 10 (No. 1 of the south yard), so that they must have crossed seven or eight tracks. At the time the girl was struck and killed she was at a distance estimated at from thirty to ninety feet west of the street known as California avenue, on the railroad grounds or yard. She was struck by one of two heavily loaded flat cars which had been pushed across California avenue, and were moving at their own momentum.

Suit was brought by Louis Mayer, as administrator. At the close of the plaintiff's evidence, on motion of the defendant, the court instructed the jury to find the defendant, the Chicago & Alton Railroad Company, not guilty.

ROSENTHAL, KURZ & HIRSCHL, attorneys for plaintiff in error.

A party waiting a reasonable time for train to remove from highway is not a trespasser, when crossing the company's grounds, by reason of the obstruction of the highway by the train. *Smith v. Savannah, etc., Co.*, 11 S. E. R. 455, 42 Am. & Eng. R. Cases 105; *Campbell v. Race*, 7 Cush. 408, with notes, in 54 Am. Dec. 728; *Lake Erie & W. R. Co. v. Mackey* (Ohio), 41 N. E. R. 980; *Reifsnnyder v. C., M. & St. P. R. R.*, 57 N. W. R. 692.

Nor can it be said that a thirteen-year-old child is, as a mat-

ter of law, guilty of contributory negligence in not looking down the track before stepping in front of the cars. Such question is for the jury. *R. R. Co. v. Whitton*, 13 Wall. 277; *C. & N. W. R. R. v. Dunleavy*, 129 Ill. 132; *C. & A. R. R. Co. v. Adler*, 129 Ill. 338; *C. & I. R. R. Co. v. Lane*, 130 Ill. 116.

WILLIAM E. HUGHES and WILLIAM BROWN, attorneys for defendant in error.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

While the maintenance by the defendant of this grade crossing with its twenty-seven railroad tracks was neither unlawful nor negligence, it was a situation existing solely for its purpose and because of its will, which could be removed at its pleasure.

Holding and using the crossing in conjunction with the public, the defendant was bound to not unnecessarily or unlawfully interfere with the public right at this place.

Being under such obligation, the defendant, in violation of law, blocked the highway and compelled those who wished to go over the road to enter upon its grounds, passing around the engine and cars standing upon the crossing, or wait until the defendant removed the obstruction.

That such entry was not, under the circumstances, a trespass, is neither disputed nor disputable. *Campbell v. Race*, 7 Cushing 8; *Smith v. Savannah Co.*, 11 S. E. Rep. 455.

The deceased, having thus lawfully come upon the premises of the defendant, instead of walking between the tracks along the side of the train back to the crossing with her little brother and sister, proceeded southward, over the private grounds of the defendant, and was struck and killed when upon such grounds, at a place variously estimated to be from thirty to ninety feet off the crossing.

It does not appear that upon the space occupied by these twenty-seven tracks, there was anything to distinguish the highway from the yard of the defendant.

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Whether a man or a child of thirteen would, from the surroundings, have been aware when thirty feet west of the highway that he or she was out of the road and upon the private grounds of the defendant, it is impossible for us to say.

If the deceased had not been induced by the defendant to go into its yard, she would, when there, have been a trespasser irrespective of her knowledge.

Whether at the moment she was struck she knew that she was upon the premises of the defendant, there is in the record nothing to show. Nor can we, under the facts of this case, presume that when no more than thirty feet west of California avenue she realized that fact.

The deceased was not, in going upon the premises of the defendant, a trespasser; once thus there, she would not become a trespasser until she had had a reasonable opportunity to go off such premises, and such opportunity she would not have without the presentation of reasonable means for learning where the yard ended and the highway began. On all sides was a great open space in which the yard and the highway were, with nothing to show where the roadway ended and the yard began.

As a conclusion of law it can not, therefore, be said that under the circumstances of this case Dora Murphy was a trespasser.

It is for the jury to say whether her relation to the defendant was, when she was struck, that of a licensee or a trespasser, and whether she was in the exercise of such care as is to be expected from prudent persons of her age and intelligence.

The judgment of the Superior Court is reversed and the cause remanded.

**Pecos Irrigation & Improvement Company v. William F. Olson, for use of Ernest Monthan.**

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64	502
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1. SHERIFF'S RETURN—*Requisites of, as a Basis for Equitable Remedies.*—In order for a sheriff to return an execution before the day which limits its life so that a foundation may be laid for the prosecution of

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equitable remedies based upon an exhaustion of legal remedies, such return must show upon its face, or by clear inference, that it is his own act.

2. *SAME—Presumptions in its Favor.*—In the absence of proof or clear implication to the contrary, it will be presumed of a return made upon the responsibility of the sheriff, that he has performed what the statute requires of him as a preliminary to making a return before the expiration of the execution.

3. *SAME—When the Presumption does not Prevail.*—No presumption prevails in favor of a sheriff's return when the same is made by the direction of the plaintiff in the writ, or where, by the substance of the return, it can not be seen that he was unable in the discharge of his official duty to find the property of the debtor.

4. *GARNISHMENT—Requisites of the Sheriff's Return.*—An officer's return to an execution by order of the plaintiff's attorneys is not a sufficient return upon which to base garnishee proceedings.

**Garnishment Proceedings.**—Error to the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the March term, 1896. Reversed with final judgment in this court. Opinion filed March 31, 1896.

MATTHEWS S. BRADLEY, attorney for plaintiff in error.

NEWCOMER & DELLENBACK, attorneys for defendant in error.

The sheriff may take the responsibility and return an execution before ninety days. *Bowen v. Parkhurst*, 24 Ill. 258; *The First Nat. Bank of Sioux City et al. v. David A. Gage et al.*, 79 Ill. 207.

A return by the sheriff in substance "no property found," is a sufficient return. *The Michigan Central Railroad Co., Garnishees of Joseph W. Leighton, v. Philip H. Keohane*, 31 Ill. 144.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

An execution upon a judgment in favor of Monthan and against Olson, for \$301.45 and costs, was delivered to the sheriff on April 1, 1895.

The sheriff held the execution until April 19th, and then made return thereof.

His return, and the directions of Newcomer & Dellen-



back, who, it is admitted, were the attorneys for the execution plaintiff, as indorsed on the execution, were as follows:

“The within named defendant, and no property of the within named defendant, found in my county on which to levy this writ; I therefore return the same by order of plaintiff’s attorney, no property found and no part satisfied, this 19th day of April, 1895.

JAMES PEASE, Sheriff.

By JAMES SHERIDAN, Deputy.

The sheriff will return the within execution, no property found and no part satisfied, forthwith.

NEWCOMER & DELLENBACK.

Dated April 19, A. D. 1895.”

Having said return for its basis, garnishee process was sued out against the plaintiff in error, who pleaded the insufficiency of the return by a plea in abatement, to which a demurrer was sustained; and final judgment being entered against the plaintiff in error, this writ of error is prosecuted from such judgment.

The question is, was the return sufficient to base the garnishee proceedings upon?

It has been decided that the return indorsed by a sheriff upon an execution writ must be read together with the direction to the sheriff to make return thereof, indorsed upon the writ by the execution plaintiff; and that to constitute a sufficient return of an execution upon which to base a creditor’s bill, the return, if made before demand upon the execution debtor, must be made upon the responsibility of the sheriff and be his own act, and not be in substance the act of the execution creditor by a mere following of his direction. *Scheubert v. Honel*, 50 Ill. App. 597; same case, 152 Ill. 313.

In *Dunderdale v. Westinghouse Electric Co.*, 51 Ill. App. 407, which was a case where garnishee proceedings were sought to be sustained upon a return of an execution *nulla bona* by order of plaintiff’s attorney, we said:

“We regard the statute relative to the filing of creditors

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bills and that concerning the issue of garnishee process upon the return of an execution, 'no property found,' as so similar that the rule as to the return of execution in one case is to be applied to the other;" and, following *Scheubert v. Honel*, *supra*, held that such a return was insufficient to sustain the garnishee proceeding.

It is argued that because the execution in question remained in the hands of the sheriff a period of nineteen days before the return was made, whereas in the cases cited the return was made on the same day of the delivery of the writ to the sheriff, an inference should be drawn favorable to the conclusion that the sheriff had done his whole duty under the writ, and that having done so, he might properly, either with or without direction, make return of the writ; but we do not think that a legal presumption to such extent arises from that mere fact.

We do not dispute the right, or the frequent duty that may arise, by the sheriff to make a return of a writ at an earlier day than that which limits the life of an execution. But in order for him to do so, and thereby create a basis for equitable remedies, which are based upon an exhaustion of legal remedies, his return must show on its face, or by clear inference, that it is his own act, in order that it may be made to appear, or the presumption to arise, that legal remedies have failed. *Bowen v. Parkhurst*, 24 Ill. 257; *First National Bank v. Gage*, 79 Ill. 207; *Russell v. C. T. S. Bank*, 139 Ill. 538.

Numerous presumptions arise from the acts of a sheriff in the performance of his duty concerning writs that come to his hands, which can not be indulged in when he acts not by himself, but in obedience to the directions of the plaintiff in the writ.

Where the return is his, "we presume nothing against the return of the sheriff, but consistently with it." *Rivard v. Gardner*, 39 Ill. 125 (127).

In other words, in the absence of proof or clear implication to the contrary, it will be presumed of a return made upon the responsibility of the sheriff that he has performed

what the statute requires of him as a preliminary to making a return before the expiration of the execution.

But no such presumption can prevail where he makes his return by direction of the plaintiff in the writ, or where by the substance of the return it can not be seen in such cases that he was unable in the discharge of his official duty to find property of the debtor. *M. C. R. R. Co. v. Keohane*, 31 Ill. 144.

It is said in *Freeman on Executions*, section 356 :

"The officer who does not obtain anything toward the satisfaction of the writ must make a return in which it is directly stated, or from which it must necessarily be implied, that the defendant has no property subject to the writ. \* \* \* The most usual obstacle met by officers is their inability, after due search, to discover property subject to the writ. Where this has been the case, and it becomes necessary to return the writ wholly or partly unexecuted, the officer must exonerate himself by stating clearly and unequivocally that the writ is returned unsatisfied because the defendant has no property subject to its satisfaction."

These rules are in no adequate way met by a return, made within the lifetime of an execution, and without demand, which shows on its face that it was made by direction of the plaintiff, and from which nothing appears to indicate that any effort was ever made to find any property.

Whether a mere return of "no property found," made without demand and within the life of the writ, although made upon the sheriff's own volition, will imply that the sheriff has made proper effort to find property on which to levy, and therefore justify the use of such a return as a basis for proceedings of an equitable nature, has never so far as we are aware, been the turning point of any decision in this State.

The form books are replete with illustrations of a more certain and seemingly a better form of return.

Thus: "The within named defendant hath no goods or chattels, lands or tenements, in my bailiwick, whereof I can cause the within execution to be satisfied." *Yates' Plead-*

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ings, 45; 1 Humphrey's Precedents, 222; 2 Harris on Entries, 505; 3 Chitty's General Practice, 316, note p.

A positive statement that a defendant hath nothing upon which levy can be made, is a very different thing from a statement that the sheriff has found nothing, uncoupled with anything to show that he has made effort to find something.

A reason for requiring either a demand, or an effort, may be found in our State, where by the statute the real estate (if any) of the defendant shall be first taken in execution.

A return with no demand, and no search, and the equitable process of garnishment following, would enable the plaintiff in the writ to circumvent the statute and get satisfaction without giving to the defendant the substantial right of redemption which he would have if his lands were levied upon and sold.

It has been urged with much plausibility and considerable force, that the form of the return in question sufficiently indicates that the sheriff had done all that the law requires of him, and that because of having done so ineffectually, the plaintiff's attorney requested that he make return accordingly.

But we do not think such is the reasonable meaning of the return.

It would have been easy for the sheriff, if he had performed all the duty that is required of him by the law, to have said so in words which would have made it plainly so appear.

Not having used such language, we must take the return as meaning simply that, no property being found, although no effort had been made to find any, the writ is returned at the request of plaintiff's attorneys.

And this, as we have already seen, is less than is required as a basis for garnishee proceedings.

The judgment of the Circuit Court will therefore be reversed, with final judgment here, and it is so ordered.

August Klaas v. The John Kauffman Brewing Co.

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63	299
63	352
66	319
67	291

1. **ABSTRACTS—Improperly Prepared.**—The court can not undertake to prepare proper abstracts or to search through the record for that which, because relied upon, should be abstracted.

**Error**, to the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed March 31, 1896.

ALLEN & BLAKE, attorneys for plaintiff in error.

HOYNE, FOLLANSBEE & O'CONNOR, attorneys for defendant in error.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

With the increase in the business of this court comes an addition to the number of cases in which there is such failure to observe the rules of practice as tends to lessen the labor of counsel and add to that of the court.

It is urged that this cause was taken up before it was at issue, and tried in the absence of the plaintiff in error.

The abstract, while failing to set forth any part of the declaration, states that to it a plea of the general issue was filed; there is then set forth the substance of a special plea, from which we infer that the action was upon a bank check. The substance of a replication to the special plea is then set forth.

Thereafter there appears to have been a verdict and judgment, whether for the plaintiff or the defendant is not shown.

It is impossible to say from this abstract, that the special plea was proper or one that might not be disregarded upon the trial. Nor does it appear from the abstract that the plaintiff in error was not present at the trial.

Anxious as we are to oblige attorneys, whom we know to

be driven by press of business, we can not, with our present dockets, undertake to prepare proper abstracts or to search through the record for that which, because relied upon, should be abstracted.

We see no reason for thinking that either the merits or the law of this case is with the plaintiff in error. The judgment of the Circuit Court is therefore affirmed.

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### James N. Crandall et al. v. The Carey-Lombard Lumber Company.

1. **VOLUNTARY ASSIGNMENT.—Publication of Notice.**—A notice under section two of the act concerning voluntary assignments, notifying creditors to present their claims within three months thereafter, must be published on the day of its date.

2. **SAME—Judgments Confessed After the Assignment.**—A judgment entered by confession against an insolvent after an assignment by him for the benefit of his creditors is not provable as a claim against the estate without evidence that the debt for which the judgment was confessed existed at the time of the assignment.

3. **SAME—When Claims Filed are to be Accepted—Who May Except.**—The theory of the statute concerning voluntary assignments, is that all claims presented to the assignee are to be accepted as just, unless some person interested as creditor or otherwise excepts, and no mere volunteer can come in as *amicus curiæ* and except.

4. **SAME—Rights of Creditors to Except to Other Claims.**—A person who has a claim as a creditor of an insolvent has a standing in court, for the purpose of filing exceptions to other claims, during the thirty days within which exceptions are to be filed.

5. **SAME—Hearing of Exceptions—Burden of Proof.**—On the hearing of exceptions to a claim, the burden is upon the claimant to show that his claim is just. Though the statute is silent as to the burden of proof, the principle that dictated Sec. 60, Ch. 3, R. S., entitled "Administration," applies.

**Proceedings—Voluntary Assignment Act.**—Appeal from the County Court of Cook County; the Hon. ORRIN H. CARTER, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed March 31, 1896.

LEVI SPRAGUE, attorney for appellants.

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Crandall v. Carey-Lombard Lumber Co.

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COWEN & HOUSEMAN, attorneys for appellee.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The assets of W. H. Rolff & Co., an insolvent debtor who had made an assignment for the benefit of his creditors, were being administered under the direction of the County Court. The first publication of notice by the assignee in attempted compliance with the second section of the act concerning such assignments was void, being dated August 15, 1893, and requiring creditors to present their claims "within three months from this date," and the first publication being in a newspaper issued August 17, 1893. *National Bank of Rondout v. First National Bank of Chicago*, 37 Ill. App. 296.

Another proper publication was made to present claims within three months from December 28, 1894.

No order of court was made, or necessary, directing that second publication. The statute requires the assignee to forthwith give notice of publication, and delay, whether by neglect or mistake, to give proper notice, does not discharge or dispense with the performance of the duty. Both of these parties had, before the expiration of three months from December 28, 1894, duly presented their claims to the assignee. That of the appellants was upon a judgment against the insolvent by confession in the Superior Court of Cook County, entered August 29, 1893, which was eighteen days after the assignment, which was August 11, 1893.

The note upon which the judgment was entered was dated August 28, 1892. On the thirtieth day after the assignee, under section four of the act, had filed his report of claims of creditors, the appellee filed exceptions under section five. On the hearing of those exceptions, the claim of the appellants was disallowed, upon the ground that their judgment was no proof that any debt to them from the insolvent existed at the time the assignment was made. There were some general statements, both by one of the appellants and by the insolvent, as witnesses, to the effect that at the time

of the assignment the insolvent owed the appellants the amount of the judgment, less costs and attorney fees, for lumber, but no effort by the appellants to prove any items or account stated. This proved nothing. *McGeoch v. Hooker*, 11 Ill. App. 649.

And the judgment and note upon which it was entered were no evidence of a debt before the date of the note. *Sweet v. Dean*, 43 Ill. App. 650.

The claim of the appellants was therefore rightly rejected, if the appellee had the right to except to it. The theory of the statute is, that all claims presented to the assignee are to be accepted as just, unless some person "interested as creditor or otherwise" excepts. Whether any person other than the insolvent could be interested otherwise than as a creditor we need not consider, but it is certain that no mere volunteer could come in as *amicus curiæ* and except. *Wallace v. Chicago & Erie Stove Co.*, 46 Ill. App. 571.

But one who has filed a claim as a creditor, must have a standing in court, for the purpose of filing exceptions to any other claims, during the thirty days within which exceptions are to be filed, else there could be no exceptions filed by any creditor. If every creditor, or person who claimed to be a creditor, were compelled to wait until the time to except to his claim had expired, then that time would also have expired as to the claim to be excepted to.

If the exceptor's claim were also duly excepted to, within thirty days, it well might be that he would have to establish his own claim before he could prosecute his exception to any other.

And on the hearing of exceptions to a claim, the burden is upon the claimant to show that it is right. Though the statute is silent as to the burden of proof, the principle that dictated Sec. 60, Ch. 3, "Administration," applies.

Now the appellants tried, but were not permitted, to show that the claim of the appellee was also upon a judgment confessed after the assignment. But no exception had been filed to that claim. The time to except was gone; the claim stood proved by operation of the statute under section 6.



Barth v. Iroquois Furnace Co.

The appellee, therefore, could properly prosecute exceptions to the claim of the appellants, even though its claim might once have been subject to the same exceptions as the claim of the appellants. It was no longer so subject.

The judgment of the County Court disallowing the claim of the appellants, with costs, is affirmed.

John Barth, Assignee of the Wilkin Manufacturing Company, v. Iroquois Furnace Company.

1. VOLUNTARY ASSIGNMENTS—*Under the Laws of Wisconsin Inoperative in this State.*—An assignee of an insolvent debtor under the laws of Wisconsin can not bring a suit in his own name in the courts of this State upon an indebtedness to the insolvent. The *lex fori* governs.

2. SAME—*Non-Assignable Choses in Action.*—A voluntary assignment under the laws of Wisconsin can not confer a right of action upon the assignee to sue in the courts of this State upon a non-assignable chose in action.

3. SAME—*Rights of a Foreign Assignee.*—As to dealings between an assignee under the laws of Wisconsin, and citizens of this State, or to the vesting of the property in tangible things—goods and chattels, lands and tenements—the assignment by the insolvent may be effectual to give the assignee a standing in the courts of this State, notwithstanding the laws of Wisconsin as to assignments by insolvents are opposed to the policy of this State, unless the rights of creditors of the insolvent conflict with the claims of the assignee.

4. DEMURRER—*To Common Counts.*—It is error to sustain a general demurrer to a common count, because of the improper use of the neuter pronoun "it."

**Assumpsit.**—Goods sold. Error to the Circuit Court of Cook County; the Hon. CHARLES G. NEELEY, Judge, presiding. Heard in this court at the March term, 1896. Reversed and remanded. Opinion filed March 31, 1896.

CRATTY BROS., GRAY, MACLAREN, JARVIS & CLEVELAND, attorneys for plaintiff in error.

It is no more necessary to state that a corporate plaintiff is a corporation than it is to state that an individual plaintiff is a man or woman. *Legnard v. Crane Company*, 54 Ill. App. 149; *Exchange Bank v. Capps* (Neb.), 49 N. W. Rep. 223.

The laws of Wisconsin are facts to be pleaded and proven. The court can not take judicial notice of such laws except as the same are set out in the declaration. 1 Greenleaf on Evidence (14th Ed.), Secs. 486, 489.

At common law an assignee in insolvency might sue in his own name to recover an indebtedness due the insolvent at the time of the assignment. 3 Parsons on Contracts (7th Ed.), 469.

Under our statutes in relation to assignments for the benefit of creditors the assignee may sue in his own name to recover an indebtedness due to the assignor at the time of the assignment. Hurd's R. S., 1895, Chap. 10a, Sec. 11.

Comity requires our courts to give effect to the laws of a sister State except so far as those rules contravene the public policy of this State. This rule extends to the name in which an action should be brought. *Wooden v. Western N. Y. & P. R. Co.* (N. Y.), 26 N. E. Rep. 1050.

Our courts recognize and enforce assignments for the benefit of creditors made in sister States except so far as they conflict with the rights of our citizens or contravene our laws or public policy. *Heyer v. Alexander*, 108 Ill. 385; *May v. First National Bank*, 122 Ill. 551; *Juillard v. May*, 130 Ill. 87.

GARDNER & McFADON, attorneys for defendant in error.

The plaintiff in error can not urge that the principle of comity obtains in this case, for the assignment law under which the appellant holds has been held by the Supreme Court of Illinois to be contrary to the policy of the law of Illinois. *Townsend v. Cox et al.*, 151 Ill. 62.

The mode in which the assignor of a chose in action is to pursue his remedy belongs to and constitutes a part of the law of the forum. Story on the Conflict of Laws, Sec. 555, 556, and notes; Wharton on the Conflict of Laws, Sec. 735.

The rule in Illinois is that a chose in action is not assignable so as to vest a right of action in the assignee. *Knight v. St. L., I. M. & S. Ry.*, 141 Ill. 113; *Reeves v. Smith*, 113 Ill. 52; *Buckmaster v. Eddy*, Breese 381; *Beezly v. Jones*, 1

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Scam. 34; McJilton v. Love, 13 Ill. 496; Hughes v. Trahern, 64 Ill. 48; McKinney v. Alvis, 14 Ill. 33; Railroad Co. v. Nichols, 57 Ill. 464; Chapman v. McGrew, 20 Ill. 101; Phillips v. Wilson, 25 Ill. App. 427.

Whether an assignee can sue in his own name is sometimes a technical question, sometimes one that is essential. When it is technical (*i. e.*, when the point is merely whether the suit is to be brought by A to the use of B, or by B immediately, there being no dispute that the title, as between the two, is virtually in B), then the *lex fori* is to decide. It is a mere matter of process. If allowed by the *lex fori*, the assignee may sue in his own name, although forbidden by the foreign law to which the obligation is subject. If forbidden by the *lex fori*, the assignee can not sue in his own name, though permitted by the foreign law to which the obligation is subject. Wharton on the Conflict of Laws, Sec. 735; Story on the Conflict of Laws, Sec. 556.

The rule is of such universal application in Illinois that a chose in action is not assignable so as to vest a right of action in the assignee; we think we need do no more than refer to the decisions to establish this proposition. Knight v. St. L. I. M. & S. Ry., 141 Ill. 113; Reeves v. Smith, 113 Ill. 52.

In Illinois an assignee of a chose in action can not sue in his own name; does the fact that the assignee claims under a foreign law which vests the title in him, change the rule of the forum?

The citation from Wharton on the Conflict of Laws, Sec. 735, above given, states the rule to be, that if allowed by the *lex fori*, the assignee may sue in his own name, although forbidden by the foreign law to which the obligation is subject. If forbidden by the law of the forum, the assignee can not sue in his own name, although permitted by the foreign law to which the assignee is subjected. See also, Leach v. Greene, 116 Mass. 536; Hay v. Green, 12 Cush. 282; Foss v. Nutting, 14 Gray, 484; Fisk v. Brackett, 32 Vt. 798; Levy v. Levy, 78 Penn. St. 507; Murrill v. Jones, 40 Miss. 565.

But the law of the remedy is no part of the contract. Burchard v. Dunbar, 82 Ill. 456; Wood v. Child, 20 Ill. 109.

When the question is settled that the contract of the parties is legal, and what is the true interpretation of the language employed by the parties in framing it, the *lex loci* ceases its functions, and the *lex fori* steps in and determines the time, the mode and the extent of the remedy. Sherman et al. v. Gassett, 4 Gilm. 531; Chenot v. Lefevre, 3 Gilm. 643.

The assignee of a chose in action can not, in the absence of a promise to himself, maintain an action thereon in his own name, but may do so in the name of his assignor. Leach v. Greene, 116 Mass. 536; Usher v. D'Wolfe, 13 Mass. 290; Foss v. Nutting, 14 Gray, 484.

The same rule has been held to apply to a sale by an official assignee of a chose in action belonging to the estate of an insolvent debtor, and that, under the provisions of the insolvent law then in force, no right of action vested in the vendee of the assignee. Hay v. Green, 12 Cush. 282.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The plaintiff here was plaintiff below, and filed a declaration as follows:

John Barth, plaintiff, by leave of court first had therefor, comes now and amends his declaration herein so as to read as follows:

"John Barth, assignee of the Wilkin Manufacturing Company, insolvent, complains of the Iroquois Furnace Company, the defendant, summoned, etc., of a plea of trespass on the case on promises: "For that whereas, on the 19th day of August, 1891, the said Wilkin Manufacturing Company became financially embarrassed and indebted to a large number of persons, and was insolvent; that on, to wit, said 19th day of August, 1891, a law was in force in said State of Wisconsin, under and by virtue of which a debtor being unable to pay his or its indebtedness, and being desirous of providing for the payment thereof by voluntary assignment

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of all its property and effects for the benefit of his or its creditors, might assign all of his or its property, effects, or choses in action to such person as he or it might select by deed of assignment for the benefit of his or its creditors, and that the said law of the said State of Wisconsin further provided that the legal title to the property and choses in action of the assignor should pass to the assignee mentioned in such deed of assignment upon the execution and delivery thereof; and the plaintiff avers that on, to wit, said 19th day of August, 1891, the said Wilkin Manufacturing Company in pursuance of the said law of the State of Wisconsin, executed and delivered to the plaintiff its deed of voluntary assignment of all its property, effects and choses in action for the benefit of its creditors, and that thereby and under the said law of Wisconsin the legal title to the property and choses in action of the said assignor vested in the plaintiff, and that he, as such assignee, was by the law of said State of Wisconsin authorized to sue in his own name to recover any indebtedness due to said Wilkin Manufacturing Company; and plaintiff avers that at the time of said assignment the said defendant was indebted to the said Wilkin Manufacturing Company in the sum of \$15,000 for goods, ware and merchandise before that time sold and delivered by the said Wilkin Manufacturing Company to the said defendant; by means whereof and by virtue of such assignment, the defendant became liable to pay to the plaintiff the said sum of money so due, and being so liable the defendant promised the plaintiff to pay him the said sum on request.

For that whereas, the defendant on, to wit, the said 4th day of May, 1892, was indebted to the plaintiff in the sum of \$15,000, for goods, chattels and effects before that time sold and delivered by the plaintiff to the defendant at its request; and in a like sum for goods, chattels and effects before that time bargained and sold by the plaintiff to the defendant at its request; and in a like sum for work and service before that time done and bestowed, and material for the same work furnished by the plaintiff for the defendant at its request; and in a like sum for money before that time

loaned by plaintiff to the defendant at its request; and in a like sum for money before that time paid and expended by the plaintiff for the use of the defendant at its request; and in a like sum for money before that time received by the defendant for the plaintiff; and in a like sum for interest on divers sums of money before that time forborne by the plaintiff to the defendant, at its request for divers spaces of time before then elapsed; and in a like sum for money found to be due from the defendant to the plaintiff on an account then and there stated between them; and being so indebted the defendant then and there in consideration thereof promised the plaintiff to pay it on request the several sums of money so due it as aforesaid.

Yet the defendant, though requested, has not paid the said sums of money above mentioned, nor any or either of them, or any part thereof to the plaintiff, but refused so to do; to the damage of the plaintiff of \$15,000; and therefore he brings suit," etc.

The defendant demurred to each count, and final judgment was entered in its favor.

The common count was good, and therefore the demurrer to it should have been overruled. The use of the neuter pronoun "it" was objectionable—if at all—only on special demurrer.

But what the parties are really at odds about is whether an assignee of an insolvent debtor under the laws of Wisconsin can sue here in his own name upon an indebtedness to the insolvent. He can not. The *lex fori* governs. Bouvier's Law Dict., *Lex Fori*; Chumasero v. Gilbert, 24 Ill. 293.

The law of Wisconsin, as well as the assignment by the insolvent, is inoperative in this State to confer a right of action upon the assignee of a non-assignable at law chose in action.

But as to any dealings between the assignee and the defendant, or as to the vesting of the property in tangible things—goods and chattels, lands and tenements—the assignment by the insolvent may be effectual to give the plaintiff a standing in our courts, notwithstanding the laws

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of Wisconsin as to assignments by insolvents are opposed to the policy of this State (*Townsend v. Cox*, 151 Ill. 62), unless the rights of creditors of the insolvent conflict with the claims of the assignee. The assignment is not void, but voidable at the instance of a creditor.

The judgment is reversed and the cause remanded.

Guy Lyon and Harry Lyon, for use of William R. Mumford, William O. Mumford, Isaiah O. Harsh,  
Copartners as W. R. Mumford & Company, v. Crew Levick Company.

1. NOTICE—*To Agents of Corporations.*—A notice properly served upon an agent who is the manager of a corporation is notice to the corporation.

2. MISNOMER—*In Writs*—A misnomer in a writ served upon a defendant does not render the writ void.

**Garnishee Proceedings.**—Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in this court at the March term, 1896. Reversed and remanded with directions. Opinion filed March 31, 1896.

C. VAN ALLEN SMITH, attorney for appellants.

BAYLE & MILLER, attorneys for appellee.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

August 15, 1895, a garnishee summons against the appellee, in favor of the appellants, was issued by a justice of the peace and served on the appellee, to which it paid no attention. Then a conditional judgment having been entered, a *scire facias* was issued and served upon the appellee, and still it paid no attention, and judgment was entered against the appellee September 12, 1895. In all the proceedings thus far stated the word "oil" was interpolated in the name

of the appellee, so that it read the "Crew Levick Oil Company."

Both writs were served upon F. B. De Beck, agent, who was, in fact, manager of the appellee, and so signed the bond given on the appeal by *certiorari*, hereinafter stated.

October 9, 1895, appellee filed a petition for a *certiorari*, verified, not by De Beck, but by one who says by affidavit, sworn October 8, 1895, "that he is superintendent of" the appellee, in which petition it is stated that the appellee "had no knowledge or information of the commencement or pendency of a suit against it, or of the rendition of said judgment," until a copy of an execution was delivered to it October 7, 1895.

De Beck was the man who was served. Notice to him was notice to the appellee.

The theory of the petition is that a misnomer of a corporation in writs served upon it renders the writs void. That is not the law. *Railroad v. Reidmond*, 11 Lea (Tenn.), 205; *Mora Corp.*, Sec. 355; *Hammond v. People*, 32 Ill. 446. See separate opinion of Judge Breese, pp. 472-3. This is a clear case of neglect by the appellee to appeal in the ordinary way.

The appellants were justified in declining to try the case again, and the judgment of the Circuit Court dismissing their suit is reversed, and the cause remanded with directions to the Circuit Court to dismiss the petition at the cost of the appellee here. The appellants recover their costs in this court.

Reversed and remanded with directions.

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**Robert G. Barrett, Jr., v. Archibald Campbell.**

1. **AFFIRMANCE**—*Where Substantial Justice Has Been Done.*—Where from the whole record it is apparent that substantial justice has been done, the court will affirm the judgment, although some evidence may have been improperly admitted.



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Barrett v. Campbell.

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**Covenant on Sealed Contract.**—Error to the Circuit Court, Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed March 31, 1896.

HAMILTON & STEVENSON, attorneys for plaintiff in error.

WILBUR & HAUZE, attorneys for defendant in error.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The parties contracted together, whereby the defendant in error agreed to erect and complete for the plaintiff in error a certain two-story frame residence, for the price of \$3,700.

Twenty-six hundred dollars was paid, and suit in covenant was brought to recover the remaining \$1,100, with interest from November 12, 1892, which was the alleged date of the completion of the contract; and the cause, coming on for trial before a jury, resulted in a verdict and judgment for \$960.

Two objections to the judgment are urged upon our consideration, one of which relates to the admitting in evidence of a certain architect's certificate, and the holding of the court as to its effect, and the other to an insufficient allowance being made because of defective work and materials done and furnished.

Whether or not the certificate was a final one, in the sense of being one that was authorized by the terms of the contract to be issued by the architect upon the completion of the job, and as such was the only certificate that could, by the terms of the contract, be conclusive evidence of the performance of the contract, we are relieved from deciding.

There was on the trial no controversy as to the fact of the contract price of \$3,700, nor of the payment of \$2,600 on account of performance, nor but that the balance of \$1,100, which was the sum specified in the certificate as the amount of payment due, remained unpaid, according to the contract.

There was no holding by the court, either in the rejection of offered evidence, or in the instructions that were given, that the certificate was conclusive evidence of the performance of the contract, but on the other hand, all the evidence offered by the plaintiff in error that tended to show incomplete and defective performance, was admitted to the jury and was doubtless given full weight by them, for by their verdict it is shown that they allowed to the plaintiff in error, on that account, nearly \$300 from the amount claimed.

The face of the certificate was for \$1,100, and the verdict and judgment were for \$960, at a date more than two years after the certificate was given.

We do not need to go far to ascertain upon what particular evidence the jury reached their conclusion, for by the testimony of an architect called by, and testifying in behalf of, the plaintiff in error, and who, at his request, made a detailed examination of the building in connection with the plans and specifications, the total deficiencies between the work as done, and that called for by the plans and specifications, aggregated the sum of \$139.65.

Another witness, an architect also, who made a detailed examination of the building in connection with the plans and specifications, and testified in behalf of the plaintiff in error, placed his estimate, made up in detail, at the sum of \$331, as necessary to put the building in the condition required.

No other witness for the plaintiff in error, so far as we have been able to discover, testified as to the difference in money value between the building as constructed and as it should have been.

The jury were, therefore, probably justified in adopting a verdict which very closely approximated what the plaintiff in error showed his actual damages to be. The verdict was for a few cents less than the difference between the balance of \$1,100 due according to the contract, and the amount of damages testified to by the first witness, and was not greatly more than the difference between that balance, with interest, and the amount of damages testified to by the last witness.

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Becker v. The People.

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Our conclusion, therefore, from the whole record is, that even if the architect's certificate was improperly admitted, its admission was in no material degree injurious to the plaintiff in error; and that the verdict was in substantial accord with what the plaintiff in error himself proved.

The judgment will accordingly be affirmed.

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**Barbara Becker v. The People of the State of Illinois.**

1. *BOND—Given on Appeal, does not Release a Supersedeas Bond.*—The giving of a bond on an appeal from the Appellate Court to the Supreme Court, does not operate as a release or discharge of a supersedeas bond given in the same cause on a writ of error to the Circuit Court from the Appellate Court.

*Scire Facias, on appeal bond.*—Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed March 31, 1896.

WM. S. YOUNG and JOHN REID McFEE, attorneys for appellant.

JACOB J. KERN, state's attorney, attorney for appellee; T. A. COFFEY, MAX RIES and E. S. BOTTUM, of counsel.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The principal question in this case is whether the giving of a bond on appeal from this court to the Supreme Court operated to release or discharge a supersedeas bond given in the same cause on writ of error to the Circuit Court from this court.

We regard that question as having been substantially settled in the negative by the Supreme Court in the case of *McCall v. Moss*, 100 Ill. 461, and *Ennor v. G. & S. W. R. R. Co.*, 104 Ill. 103. It would therefore have availed nothing to the appellant, if her plea of release from liability as surety

upon the supersedeas bond, because of the giving by her principal of a subsequent bond with a different surety upon an appeal of the same cause from this court to the Supreme Court, had been allowed to be filed. We are unable to see that the fact that both bonds were in the same penalty and were for the same judgment of fine, as well as costs, in any way affected the liability of the surety upon the supersedeas bond which was the one sued on.

It is only necessary to add that there was no material error in admitting oral evidence of the amount due upon the bond. The bond was in evidence, as were also the orders of affirmance by both this and the Supreme Court, and the testimony of the witness Bottum as to the amount due was at most superfluous, and could have done no harm.

Having examined the record with care and studied appellant's brief with attention, we find no substantial error, and therefore the judgment will be affirmed.

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102	577

### D. W. Ryan v. Waukesha Spring Brewing Company.

#### Same v. Same.

1. ACTIONS—*An Entire Cause of, can not be Divided.*—An entire cause of action can not be split and several actions maintained upon it.

2. SAME—*What is not an Entire Account.*—A running account with no time of payment for any item in it, agreed upon, is an entire cause of action; but where each item of the account is sold upon stated periods of credit, the rule is different. Each item then constitutes a separate cause of action which may be commenced and maintained as soon as the time of credit expires.

**Assumpsit, goods sold.** Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the March term, 1896. Reversed, and judgment entered in this court. Opinion filed March 31, 1896.

SOANLAN, MCGAFFEY & MASTERS, attorneys for appellant.  
A plaintiff can not split one entire demand, and if he does

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and recovers judgment on a part, such judgment is a bar to a recovery upon the balance. Such is the common law, and it is a rule founded on reason and prevents vexatious litigation. *Nickerson v. Rockwell*, 90 Ill. 460.

The statute of this State enforces the converse of the common law and requires distinct demands within \$200 to be consolidated in suits before a justice of the peace. *Starr & Curtis*, Cap. 79, Sec. 49.

Independent of any statute where a person has two claims against another of such a nature as to be consolidated, but if consolidated they exceed a justice's jurisdiction, he must go to a court having jurisdiction of the consolidated amount; but this is not the common law doctrine. It properly applied only when there is one demand—not where there are two or more claims or demands. *Nickerson v. Rockwell*, 90 Ill. 464.

The case of *Casselberry v. Forquer*, 27 Ill. 170, would seem at first blush to be fairly decisive in the cases at bar, but the gist of the opinion says no more than that one demand can not be split. Forquer rented premises for \$150 per year payable in semi-annual installments of \$75. When four of these installments became due, instead of bringing two suits for \$150 each, she brought as many suits as there were installments then due. The court held that Forquer might have brought two suits of \$150, but that she could not bring suits for the installments, because each \$150 was an entire demand, and the said installments arose out of one contractual relation, to wit, the lease.

On a lease with yearly rental of \$600 per year, if the lessor waits until two years are due the two do not constitute one demand, but are separate demands upon which two actions may be brought. *McDole v. McDole*, 106 Ill. 452.

Where a note is given payable in one year with interest payable semi-annually, and a suit brought two years thereafter to recover the installments of interest then due, and a recovery therein, such judgment will be no bar to a subsequent action on the note to recover the principal. In such case, the promise to pay interest is a distinct cause of action

from the promise to pay principal. Each promise constitutes a distinct cause of action. *Dulaney v. Payne*, 101 Ill. 325.

See also *Wehrly v. Morfoot*, 103 Ill. 583.

LACKNER & BUTZ, attorneys for appellee, contended that a plaintiff can not so divide an entire demand or cause of action as to maintain several actions for its recovery, and if he sue and recover a judgment for a part only of such a claim, the remaining portion is barred by that recovery. *Camp v. Morgan*, 21 Ill. 248.

It has been long settled that a cause of action can not be severed or made a foundation of several suits instead of one. *Chicago & N. W. Railway Co. v. Nichols*, 57 Ill. 467; *Lucas v. Le Compte*, 42 Ill. 303; *Rosenmueller v. Lampe*, 89 Ill. 213.

Until an account is rendered and a request made for payment, it may well be said that each additional item of credit is but adding to a previous indebtedness and that the whole constitutes a single cause of action. *Town of Whitehall v. Meaux*, 8 Ill. App. 182.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

Two appeals of the same title and involving the same question, are here. The cases were tried without a jury. The question is upon these facts. In November, 1894, the president of the appellee was told by the appellant—a cooper—the price, \$2.09, of half barrels, delivered in Waukesha.

On each of the days, December 14, 17 and 18, 1894, on orders by the appellee, the appellant shipped half barrels to the appellee, on a credit of ninety days.

June 17, 1895, the appellant sued the appellee for the price of the December 18th order, and recovered judgment.

Is that judgment a bar to the separate actions to recover for the half-barrels shipped on the orders of the 14th and 17th?

An entire cause of action can not be split and several actions maintained upon it—that is conceded.

The case does not show that when the price was given, the term of credit was also; but in the nature of the transaction, the price, place of delivery, and term of credit, must have been agreed upon before orders were given.

March 15, 1895, a suit might have been brought for the first shipment; March 18, 1895, another suit for the second shipment; and March 19, 1895, a third suit for the last shipment. The pendency of either suit would not have been in abatement of, or a judgment in it a bar to, either of the others.

The lapse of time would not have coalesced three independent and individual causes of action into one, had suits been begun as stated. Now why does the lapse of time have the effect of so coalescing if no suit is begun? Why, because *Casselberry v. Forquer*, 27 Ill. 170, so decides, and there is no escape from it. Should the question in that case ever again come before the Supreme Court, and the case be exactly in point, it may be adhered to; but it is not exactly in point here, as it seems to be explained in *McDole v. McDole*, in 106 Ill. 452. It is there treated as a single promise to pay one entire sum of money, upon a single consideration, in installments, and as holding that more than one installment due, is but one cause of action. Here the promise to pay for each shipment is a separate promise, based upon a separate consideration. Nor does this case resemble *Lucas v. Le Compte*, 42 Ill. 303, which only holds that a running account with no time of payment for any item in it agreed upon, is an entire cause of action. So is the law generally held. Black on Judgments, Sec. 736.

Without copying, I refer to *Secor v. Sturgis*, 16 N. Y. 548, for an elaborate statement of what distinguishes one entire cause from several separate causes of action; the sum of it—so far as pertinent here—being that “each contract affords one and only one cause of action.” An illustration of that principle is found in *Cashman v. Bean*, 2 Hilton, 340, where sales of goods at different times upon six months

credit, were held to constitute separate causes of action, though all the money was due when suit was commenced.

These cases having been tried by the court, this court will do what that court should have done, and enter final judgments that the appellant recover in each case with costs; the judgments appealed from being reversed.

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**James Pease, Sheriff, v. Joseph H. Francis, Assignee.**

1. **VOLUNTARY ASSIGNMENTS—Power of the County Court to Order a Release of Levy.**—When the assignee is in legal possession of the property assigned, and the same is taken from him by the sheriff under an execution against the assignor, the County Court has jurisdiction to protect the possession of the assignee and order a return of the property.

**Proceedings under the Act Relating to Voluntary Assignments.**—Error to the County Court of Cook County; the Hon. ORRIN H. CARTER, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed March 31, 1896.

MOSES, PAM & KENNEDY, attorneys for plaintiff in error.

E. A. ROSENTHAL and M. SALOMON, attorneys for defendant in error.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The facts of this case are that about half past eleven P. M., of September 17, 1895, the plaintiff in error, sheriff of Cook county, received an execution against Leon Hornstein, who had a place of business at 148 Monroe street, in Chicago, and the deputy of the plaintiff went at once to levy, but the place was shut up.

He went again early the next morning, went up in the elevator with two men, who went to the place of Hornstein's business, one of whom unlocked the door, and the deputy went in and took, and has, or had up to the time of



trial below, kept possession under a levy upon the execution.

About half-past ten P. M. of the same September 17, 1895, Hornstein, having executed a deed of assignment for the benefit of his creditors, delivered it to the defendant in error, the assignee, and about half past one A. M. of that night they went together to the place; went in, the defendant in error having the key by delivery from Hornstein, and unlocking the door, walked around in the place, came out and locked up.

At half past six A. M., September 18, 1895, the defendant in error went again, and found a deputy sheriff inside who told the defendant in error that he was pleased to see him, but "you can't come in." Under these facts the County Court was justified in finding that the assignee was in legal possession from half past one A. M., September 18, 1895, and that such possession took precedence of any claim under the execution, upon the doctrine of *Feltenstein v. Stein*, 157 Ill. 19; and that the County Court had jurisdiction to protect that possession, upon the doctrine of *Hanchett v. Waterbury*, 115 Ill. 220, as extended by *Farwell v. Cohen*, 138 Ill. 216. To copy from those decisions, and show their applicability, would not increase knowledge, and the order directing the plaintiff in error to surrender the property to the defendant in error is affirmed.

This case is no precedent as to the sufficiency of the certificate of the County Clerk to the record. We may affirm upon a record which we could not reverse upon. *Troy Laundry Machine Co. v. Kelling*, 157 Ill. 496. Affirmed.

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166	637

### William Grace and Frank D. Hyde v. The Oakland Building Association et al.

1. **EQUITY PRACTICE—*Averments of the Bill and Exhibits.***—Where a statement of a supposed fact is unnecessarily in an exhibit, and the bill contains an averment that the fact is otherwise, upon demurrer the averment of the bill is to be taken as true.

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Grace v. Oakland Building Ass'n.

2. *SAME—Allegations not Admitted Must be Proved.*—Corporate capacity to sue, if not denied by the answer, is an exception to the rule that whatever is alleged by the bill, and material if not admitted by the answer, must be proved.

3. *MECHANIC'S LIENS—Sufficiency of Statement.*—A statement of a claim for a lien under section 4 of chapter 82, R. S., entitled Liens (in force previous to July 1, 1895), which contains no dates as to where the materials were furnished or labor performed, is insufficient.

*Bill to Enforce a Mechanic's Lien.*—Error to the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed March 31, 1896.

F. W. BECKER and DALE & FRANCIS, attorneys for plaintiffs in error.

WOLSELEY & HEATH, attorneys for defendants in error.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The opinion of this court in *Schroth v. Black*, 50 Ill. App. 168, might have been more clearly expressed.

The effect of it, upon the point under consideration, is, that where a statement of a supposed fact is unnecessarily in an exhibit, and the bill contains an averment that the fact is otherwise, upon demurrer the averment in the bill is to be taken as true—not that the meaning or construction of an exhibit can be changed by any averment in the bill.

The plaintiff in error filed a cross-bill to enforce a mechanic's lien. The proceeding is under chancery rules by the law in force when the cross-bill was filed, May 25, 1895, as well as by the law which took effect July 1, 1895. Therefore, whatever was alleged by the cross-bill, and material, if not admitted by the answer, must be proved, or no relief can be given. *DeWolf v. Long*, 2 Gilm. 679, has been adhered to in a great many cases. *Nelson v. Pinegar*, 30 Ill. 473. Corporate capacity to sue, if not denied by the answer, is an exception. *Enos v. Chesnut*, 88 Ill. 590.

The master, to whom the case had been referred, reported against the appellants, because, as he truly stated, there are

Swift & Co. v. Madden.

in the claim filed by the appellants, under Sec. 4, Ch. 82, of the law in force when this cross-bill was filed, no dates as to when materials were furnished or labor performed. The appellants therefore had no lien, and the decree dismissing the cross-bill is affirmed. *Fried v. Blanchard*, 58 Ill. App. 622. Affirmed.

Swift and Company v. Peter Madden.

68	341
67	333
63	341
165	41

1. **AMENDMENTS**—*Additional Counts—Statute of Limitations.*—Where the injury complained of in an additional count to a declaration in an action for personal injuries filed after the statute has run, is identical with that charged in the original declaration, a demurrer to a plea of the statute of limitations to such additional count is properly overruled.

2. **VARIANCE**—*Must be Raised in the Court Below.*—A variance must be specifically pointed out in the trial court and in apt time.

**Trespass on the Case**, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed March 31, 1896.

JOHN A. POST and JOHN B. BRADY, attorneys for appellant.

FRANCIS T. MURPHY, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action to recover damages arising from personal injuries received by an employe of appellant.

On August 29, 1892, the plaintiff filed his declaration, alleging substantially as follows:

That the defendant on, to wit, the 7th day of June, 1892, at the city of Chicago, was engaged in the business of manufacturing, among other things, glue, and that while so engaged, "employed the plaintiff to shove or move certain buckets on wheels or cars upon and along certain rails laid

in the shop or factory of defendant at, to wit, the said city of Chicago, for the purpose of moving from one part of said factory or shop to the other part thereof, articles used in the manufacture of said substance.

"And thereby it then and there became the duty of the defendant to have constructed or laid said rails and switches in a proper manner, and to have kept the same in such good and safe state of repair that the plaintiff might safely work at his said employment of shoving said buckets on wheels or cars; yet, the defendant, not regarding its duty in that behalf, nor used due care and diligence in that behalf, but on the contrary thereof, negligently and wrongfully allowed said rails and switches to said factory at Chicago aforesaid, to be and remain in an unsafe and dangerous condition, so that the plaintiff, while so employed by the defendant in shoving and moving said buckets from one part of said factory to another part thereof, and with all due care and diligence on his part upon certain switches to turn said bucket or car in the direction he was ordered to go with said bucket in said factory at Chicago aforesaid, being in an unsafe and dangerous condition for want of repair, did not remain open and allow said bucket on said rails to move in the direction intended, as it would if it had been in a proper state of repair, but said switch closed and sprung back," etc.

To the above declaration the defendant filed a general demurrer, which was confessed by the plaintiff.

On November 28, 1892, the plaintiff filed his amended declaration, alleging substantially as follows:

That the defendant on, to wit, the 7th of June, 1892, etc., engaged in the manufacture of a substance called glue, and while so engaged "employed the plaintiff to shove or move certain buckets from one part of said factory or shop to other parts thereof, for the purpose of carrying articles used in the manufacture of said substance;" the plaintiff avers that "each of said buckets was hung on a hook attached to a pulley or bolt of iron, which pulley or bolt of iron was attached at the other and upper end to two wheels, which ran upon certain rails or lines of railway," etc.

"That he was employed by defendant to move said buckets from one part of said factory to another, and thereby it then and there became the duty of defendant to have kept the said line or lines of railway and switches in a good and safe condition of repair, that the plaintiff might safely work at his said employment of moving the said buckets."

"The defendant did not regard its duty in that behalf, nor use due care or diligence in that behalf, but on the contrary thereof negligently and wrongfully permitted and allowed said switches in said factory, etc., to be and remain in an unsafe and dangerous condition, so that the plaintiff while so employed by defendant in shoving and moving said buckets from one part of said factory or building to another part thereof, with all due care and diligence on his part, turned a certain switch to move said bucket in the direction in which he was ordered to go with said bucket, on the day aforesaid, in said factory or building, etc., said switch being in an unsafe and dangerous condition for want of repair, which fact was not known to the plaintiff, did not remain in the position in which plaintiff had properly placed it, so as to allow said bucket on said rail or line of railway to move in the direction intended, but said switch closed and sprung back as plaintiff moved the bucket to turn the same upon said switch."

To the above declaration, the defendant filed its plea of not guilty, and the plaintiff added his similitur.

On June 23, 1894, more than two years after plaintiff was injured, he asked leave of court to file instanter additional counts to his declaration, which motion was allowed, the first count containing substantially the following:

"It then and there became the duty of the defendant whenever the lines of railway so became broken, or out of repair and dangerous and unsafe, to repair the same, that plaintiff might safely work at his said employment, yet the defendant, although notified that the lines of railway and switches were out of repair and unsafe, and although it promised that the lines of railway and switches should be at once repaired, and thereby caused the plaintiff to continue

in his said employment, did not regard its duty in that, and carelessly and negligently permitted said lines of railway and switches to be and remain out of repair and in an unsafe and dangerous condition," etc.

The second count of the additional counts alleges substantially as follows:

"The defendant, well knowing that a certain switch was out of repair and unsafe and dangerous, on, to wit, said date, June 7, 1892, carelessly and negligently ordered the plaintiff to move a certain bucket from one part of the factory to another, and over and across said switch, which was then and there out of repair and unsafe and dangerous, by means whereof the plaintiff, while so employed by defendant in moving and shoving said buckets from one part of the factory to another part thereof, over and across said switch, with all due care and diligence on his part, to wit, on the day aforesaid, moved said bucket in the direction he was ordered to go with it, which said switch did not remain in the position in which plaintiff had properly placed it, so as to allow said bucket to move in the direction intended, but said switch closed and swung back as the plaintiff moved the bucket upon the switch."

To the first additional count of plaintiff's declaration defendant filed two pleas of the statute of limitations.

Plaintiff demurred to defendant's pleas of the statute of limitations, which demurrer, the court, on January 29th, 1895, sustained.

To which ruling the defendant excepted.

A majority of the court is of the opinion that the demurrer to the plea of the statute of limitations was properly sustained.

The injury complained of being identical with that charged in the amended declaration, a majority of the court hold that the cause of action originally set forth was the same as that declared upon in the additional count filed June 23, 1894. *Blanchard v. L. S. & M. S. Ry. Co.*, 26 Ill. 416; *N. Chi. R. M. Co. v. Monka*, 107 Ill. 340; *Smith v. Taggart*, 21 Ill. App. 538; *C. & N. W. R. R. v. Trays*, 17 Ill. App. 136.

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Lowis v. Conrad Seipp Brewing Co.

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This question eliminated, the whole controversy is upon questions of fact; as to these the finding is naturally against the defendant.

The variance claimed to exist between the evidence and the declaration was not pointed out upon the trial, where such variance could easily have been removed.

The jury is, under the instruction of the court, the judge as to the weight and tendency of the evidence; a verdict sanctioned by the trial judge can not be disregarded by us merely because our conclusion is otherwise.

The plaintiff's abstract omits material evidence upon the question of negligence, a practice not to be encouraged.

There are some things that tend to cast suspicion upon the plaintiff's case, but we find no sufficient reason for setting aside the judgment he has obtained, and it is affirmed.

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**Joseph Lowis and Myer Lowis v. Conrad Seipp Brewing Company.**

**Same v. Same.**

1. **JUDGMENTS—A Unit—Exception to the Rule.**—The rule that a judgment is a unit, and on appeal therefrom, if set aside as to one, will be as to all, does not apply to cases where the defense of one is purely personal, as infancy, lunacy or bankruptcy.

2. **DURESS—Execution of Legal Process.**—An attempt to levy an execution upon the goods of a defendant is not duress, and a note and chattel mortgage to prevent the levy can not be said to have been executed under duress.

**Two Cases.**—(1) Application to vacate judgment. Error to the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding.

(2) Bill for injunction and relief. Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed March 31, 1896.

BLUM & BLUM, attorneys for Joseph Lowis and Myer Lowis, plaintiffs in error.

A power of attorney to confess judgment by an infant is absolutely void. *Cole v. Pennoyer*, 14 Ill. 158; *Fuqua v. Scholem*, 27 Legal News (Chicago), 60 Ill. App. 140; *Schouler's Domestic Relations*, Secs. 400, 401; *Tyleron Infancy and Coverture*, 47; 1 Am. Lead. Cases, 248.

Whether a judgment against two persons entered by confession on a warrant of attorney may be set aside as to one of them and stand good as to the other is an unsettled point. It depends upon whether in the particular State the joint judgment is considered an entirety or a severalty. *Black on Judgments*, Sec. 77, and cases cited.

It has been held that where the judgment is erroneous against one defendant by reason of a lack of jurisdiction, it is void as to other defendants. The judgment is an entirety, a unit, and must be wholly reversed. *McDonald v. Wilkie et al.*, 13 Ill. 22; *Smith et al. v. Byrd*, 2 Gilm. 412; *Brockman v. McDonald*, 16 Ill. 112; *Griffith v. Furry*, 30 Ill. 256; *Goit v. Joyce*, 61 Ill. 489; *Wins v. Chalford*, 82 Ill. 218; *C. & St. L. R. R. Co. v. Easterly*, 89 Ill. 156; *Kingsland v. Koeppe*, 137 Ill. 344.

A judgment void as against one defendant is a mere nullity as to all. *Mendelhall v. Springer*, 3 Harr. (Del.), 87; *Harris v. Wade*, 1 Chit. 322; *Wood v. Heath*, 1 Id. 708; *Ram v. Olderson*, 7 Hun 453; *Britten v. Burton*, 1 Chit. 708; *Chapin v. Thompson*, 20 Cal. 681; *Hanby v. Welsh*, 59 Md. 239; *Black on Judgments*, section 211.

In equity, contracts are set aside for force exciting apprehension short of the duress of the common law. Where a party is not a free agent, and is not equal to protecting himself, the court will protect him. 1 *Story's Equity*, 239; *Foshay v. Ferguson*, 5 Hill 158; *Spaids v. Barrett*, 57 Ill. 289.

WINSTON & MEAGHER, solicitors for Conrad Seipp Brewing Company; FREDERICK R. BABCOCK, of counsel.

The acts of a minor are voidable but not void. *Burnham et al. v. Kidwell*, 113 Ill. 429; 1 *Parsons on Notes and Bills*, p. 67, n. f.; 1 *Parsons on Contracts*, p. 295, n. u.



The rule that a judgment must be regarded as a unit, and if set aside as to one defendant must be set aside as to all, has its exceptions, viz., those in which one of the defendants pleads a personal defense, such as infancy, coverture, lunacy and the like. In such a case the judgment will be set aside as to him who pleads such defense, but will be held good against the other defendants. *Briggs v. Adams*, 31 Ill. 486; *Felsenthal et al. v. Durand et al.*, 86 Ill. 232; *Byers v. Bank*, 185 Ill. 423; *Aten v. Brown et al.*, 14 Ill. App. 451.

Where a judgment is entered against an adult and an infant, the fact that the judgment is void as to the infant can not invalidate the judgment against the adult. *Reid et al. v. Degener et al.*, 82 Ill. 508.

After condition forfeited in a chattel mortgage, the title to the property becomes vested in the mortgagee. *McConnell v. People*, 84 Ill. 583; *Jefferson v. Barkto*, 1 Ill. App. 568; *Cunningham v. Hamilton*, 25 Ill. 212; *Bodley v. Anderson*, 2 Ill. App. 450.

Where a party threatens nothing which he has not a legal right to perform, there is no redress. Thus, where one who has a note and mortgage threatens to foreclose if full claim is not paid, there is no duress. *Vick v. Shinn*, 4 S. W. Rep. 60.

A threat to execute legal process in a civil action is not duress. *Wilcox v. Holland*, 23 Pick. 167; *Forbes v. Appleton*, 5 Cush. 115; *Webber v. Aldrich*, 2 N. H. 461; *Colwell v. Peden*, 3 Watts (Pa.) 327; *Quinnell v. Washington*, 10 Mo. 53; 10 Houck 54; *Peckham v. Hendrew*, 76 Ind. 47; *Barrett v. Spaid*, 70 Ill. 410; *Hall v. Gustin*, 54 Mich. 624.

A mortgagee in possession for condition broken has a right to retain possession as against either the mortgagor or his creditors, until his possession is attacked in some mode known to law. *Cummings v. Holmes*, 107 Ill. 552.

A court of chancery will not assume jurisdiction to restrain a mere breach of the peace or ordinary trespass, where the result of the injury is not in itself irreparable. *Hamilton v. Stewart*, 59 Ill. 330; *Herrington v. Herrington*, 11 Ill. App. 127; *Goodell v. Lassen*, 69 Ill. 145.

A mere allegation of irreparable injury is not sufficient proof of such irreparable injury, but must be specifically set forth. *Poyer v. Village of Desplaines*, 20 Ill. App. 30; 123 Ill. 111; 1 High on Injunctions, Sec. 34.

An injunction is not allowed to restrain a party from doing an act which has already been done. *Wangelin v. Goe*, 50 Ill. 459.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

These two cases, disposed of upon one opinion, have arisen out of the giving by a father and his minor son of their judgment note, and an agreement by the defendant in error to loan to the minor \$500, to be secured by his note and a chattel mortgage upon certain saloon fixtures. The defendant in error having, after the making of the agreement, learned that Myer Lowis was a minor, refused to loan him the money and returned to him his notes.

The judgment note, upon which judgment by confession was entered, was executed by Joseph and Myer Lowis, and was for \$1,000, being given for certain saloon fixtures placed in their saloon by the defendant in error. Upon the entry of judgment upon this note plaintiffs in error moved to have such judgment set aside, with the result that as to Myer Lowis, the minor, it was removed, leaving it standing as to Joseph Lowis.

It is urged that in this State a judgment is a unit, and if set aside as to one must be as to all defendants.

This is, as a rule, true on appeal from error alleged as to the rendering of the judgment itself.

In an application to set aside a judgment by confession, an appeal is made to the equitable as well as law powers of the court, and the court proceeding upon equitable principles, may remove the judgment as to some and allow it to stand as to others.

Such was the course pursued in this case. The judgment was for a just debt, for which Joseph Lowis could and did give a judgment note. Myer Lowis being a minor, the

warrant of attorney was not binding upon him, and as to him the judgment was vacated. *Fuqua v. Sholem*, 60 Ill. App. 140.

The rule that a judgment is a unit, and, on appeal therefrom, if set aside as to one will be as to all, does not apply to cases where the defense of one is purely personal, as infancy, lunacy or bankruptcy. *Felsenthal v. Durand*, 86 Ill. 232.

The judgment note for \$1,000 was secured by a chattel mortgage upon the fixtures of a saloon. This mortgage contained a clause that if the mortgagors should cease to purchase beer of the mortgagee, the indebtedness secured should at once become due and payable. The mortgagees, having learned that Myer Lowis was a minor, refused to loan him \$500 with which to purchase his father's interest in the saloon; thereupon the mortgagors declined to buy any more beer of the defendant in error, which company at once proceeded to foreclose its mortgage.

To prevent this, plaintiffs in error filed a bill, and, without notice, procured an injunction against such foreclosure; this injunction was, upon motion of appellees, dissolved, from which order of dissolution and dismissal of the bill an appeal was taken to this court.

Among other matters it was alleged that the judgment note and chattel mortgage were obtained by duress.

Plaintiffs in error in the bill claimed that the mortgaged fixtures were originally given by defendant in error to Joseph Lowis, to induce him to buy beer from said Seipp Brewing Co. That upon the failure of said brewing company to loan Myer Lowis \$500, as it had agreed to do, Joseph and Myer Lowis refused to buy beer of the defendant in error, whereupon it sued out a writ of replevin for said saloon fixtures; that the sheriff, with the writ therefor issued, came to the saloon and demanded said fixtures; "that appellants declined to allow the writ to be served;" thereupon the sheriff, plaintiff's attorneys and two wagon loads of police officers entered the saloon, stopping all business therein, and greatly terrifying appellants, who, to prevent

the carrying away of said saloon fixtures and the breaking up of their business, executed the said note and chattel mortgage.

Appellee answered the bill, denying that it gave said fixtures to any one, denying all intimidation and duress of appellants, and asserted that the note and mortgage were freely and understandingly executed, and the said mortgage foreclosed for a willful breach of the conditions thereof.

Many affidavits in support of the bill and answer were read upon the motion to dissolve the injunction; the proceedings upon another bill and in the matter of the judgment and application to set the same aside, before mentioned, being also placed before the court.

We find in the record so made up no sufficient reason for setting aside the action of the Superior Court.

The burden of proof was upon appellants; they asserted that the brewing company had given this large quantity of saloon fixtures to Joseph Lowis, and that by duress he and his son had been compelled to execute a judgment note and a chattel mortgage.

A gift of these fixtures was not made out; nor was there such duress as calls for the interposition of a court of equity. The brewing company had lawfully sued out a writ of replevin for these fixtures; with such writ the sheriff was present to remove them. The right to the possession of these fixtures would, in due course, have been determined in that suit. To avoid the execution of such writ and such trial, appellants executed a note and the chattel mortgage.

Appellants, having thus, by giving a mortgage, been enabled to retain possession of the fixtures, now seek, by the aid of a court of equity, to defeat the incumbrance they gave, while keeping all that they obtained by doing that which they ask to have declared of no effect.

The Superior Court properly dissolved the injunction, and its decree is affirmed.

James A. Bishop v. Leopold Loewus et al.

63 351  
63 374

1. APPELLATE COURT PRACTICE—*Abstracts*.—An index is not an abstract. It gives the court no information.

Debt, on foreign judgment. Error to the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed March 31, 1896.

EDWY LOGAN REEVES, attorney for plaintiff in error.

MAEVIN E. BARNHART, attorney for defendants in error;  
WALTER OLDS and CHARLES F. GRIFFIN, of counsel.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

Says Isaiah xxviii. 9, 10, "Whom shall he teach knowledge? And whom shall he make to understand doctrine? \* \* For precept must be upon precept; \* \* line upon line, line upon line; here a little and there a little," and yet constant repetition, in multitudes of cases, of the doctrine copied from 137 Ill. in *Wabash R. R. v. Smith*, 58 Ill. App. 419, that the "abstract must, as against the appellant, be deemed sufficiently full and accurate to present all errors upon which it now relies," seems to have no effect toward causing the abstracts filed here to be such that we can see, by such abstracts, what the action of the court below, of which complaint is made, was based upon.

An index simply is not an abstract.

It is useless to fill space here with citation of cases, as they can easily be found in the indices of the reports of cases decided by the several Appellate Courts of this State, and in the digests.

The abstract here, after the placita, praecipe and summons, and the assignment of errors, as shown in the abstract are as follows:

"5. On the 21st day of February, 1894, declaration in an action of debt filed in the office of the clerk of the said Superior Court, in the usual form, on a judgment obtained in the State of Minnesota.

7. Copy of judgment sued on, showing the amount of interest allowed on said judgment to be seven per cent per annum.

10. Showing that the only claim of the plaintiff was seven per cent interest on the amount involved.

19. Affidavit of Harry D. Irwin, showing that they only claim seven per cent interest on the amount.

20. Appearance of James A. Bishop, by E. L. Reeves, attorney.

20. Continuation of page 20, court granted leave to defendant to file an amended plea in abatement instant, which the court afterward struck from the files.

22. The defendant on the day and year aforesaid, March 15, 1894, filed the amended plea, according to leave of court, instant, which is set out in full, page 22, and continuing on page 23.

22. Judgment entered by the court; debt, \$1,454.58; damages, \$1,023.28."

" ASSIGNMENT OF ERRORS ON BEHALF OF JAMES A. BISHOP,  
PLAINTIFF IN ERROR.

1. The plea of the defendant was to the jurisdiction, filed in apt time and in proper form.

2. The plea was unanswered.

3. The court erred in striking the plea from the files and entering judgment; issues should have been joined and a trial had on the issues tendered.

4. The court erred in allowing judgment in excess of the amount claimed in plaintiff's declaration.

5. It was not necessary to except to the judgment."

Such a misnamed abstract gives us no information as to what the Minnesota judgment was—who were the parties to it—what the supposed matter in abatement was, or how pleaded, nor of the state of the record when the plea was stricken out, nor why it was done.

The judgment is affirmed. *Klaas v. John Kauffman Brewing Co.*, 63 Ill. App. 319; *Schmitt v. Devine*, 63 Ill. App. 289.

**Gregory H. Hovnanian v. Nicholas Bedessern and Edward A. Higginbotham.**

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64	290
64	353
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1. **INJUNCTION—Landlord and Tenant.**—A landlord is entitled to an injunction to prevent the violation by the tenant of a restriction upon the use of the demised premises, although the term for which the premises were demised has nearly expired.

2. **SAME—Purpose of an Interlocutory Injunction.**—The only purpose of an interlocutory injunction is to protect the complainant until the merits of the case can be determined. If he can have no relief at the hearing he can have no interlocutory injunction.

3. **SAME—Issued Without Notice.**—An injunction issued without notice and with no showing that cause for so doing existed, under section 3, chapter 69, R. S., entitled "Injunctions," is properly dissolved.

4. **EQUITY PRACTICE—Insufficient Verification of a Bill.**—Where a complainant swears that he "knows the facts stated in his bill, and that all and each of said facts are true," the verification is a nullity.

5. **APPEALS—From an Order Dissolving an Injunction.**—An appeal does not lie from an order dissolving an injunction. *Taylor v. Kirby*, 31 Ill. App. 658.

**Bill for an Injunction.**—Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the March term, 1896. Reversed and remanded. Opinion filed March 31, 1896.

CHESTER FIREBAUGH, attorney for appellant.

If the allegations of the bill were sufficient the complainant was entitled to injunction, even though a violation of same would occasion him no substantial injury. *Consolidated Coal Company v. Schmisser*, 135 Ill. 371; *Kirkpatrick v. Peshine*, 9 C. E. Green 206; *Stewart v. Winters*, 4 Standf. Ch. 587; *Star Brewery Company v. Primas*, 59 Ill. App. 581.

In dismissing bill the court must have decided something not submitted to it; if it was proper to dissolve the injunction, the bill should have been set down for trial in the regular way, not dismissed. *Clabby v. Sheldon*, 47 Ill. App. 166; *Beam v. Denham*, 2 Scam. 58; *Martin v. Jamison*, 39 Ill. App. 248; *Gillett v. Booth*, 6 Ill. App. 429.

An order dissolving an injunction is appealable where it is a final order. *Clabby v. Sheldon*, 47 Ill. App. 166. A

decree dissolving an injunction may be either interlocutory or final. It will be final where no other relief is sought than the injunction, and where it is dissolved for want of equity on the face of the bill. It is therefore an appealable order. *Titus v. Mabee*, 25 Ill. 232; *Prout v. Maghee*, 79 Ill. 331; *Cors v. Tomkins*, 46 Ill. App. 322.

It is the duty of the party who wishes to sustain a decree to preserve the facts or have proper findings made in the decree; the appellee not having done this, there is nothing to support the decree or judgment and it must fall. *Marvin v. Collins*, 98 Ill. 519; *Alexander v. Alexander*, 45 Ill. App. 211; *Chicago Public Stock Exchange v. McGlaughery*, 148 Ill. 382.

H. T. & L. HELM, attorneys for appellee Nicholas Bedessern.

The injunction was granted without notice of the time and place of the application having been given to the defendants, and without showing, from the bill or affidavit in support thereof, that the right of the complainant would be unduly prejudiced if the injunction was not issued without such notice. This was in contravention of the statute. Revised Statutes, Chap. 69, Sec. 3.

An injunction granted without notice is in violation of the statute. A mere statement of a conclusion in an affidavit is not sufficient to make it appear that the complainant will be unduly prejudiced if the injunction is not issued without notice. It is the court, judge, or master to whom that conclusion is to appear, and the facts from which it is to be drawn should be stated to the court, judge or master. *King v. Partridge*, 60 Ill. App. 475; *Carpenter v. White*, 43 Ill. App. 451; *Brough v. Schanzenbach*, 59 Ill. App. 407.

To sustain an injunction, granted without notice, all the essential and material allegations must be positively proved and stated. 1 High on Injunctions, 35.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The case presented by the bill of the appellant is that



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Hovnanian v. Bedesern.

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June 26, 1895, the appellee, Bedesern, demised to the appellant apartments in a large building for use as a dwelling and office as a physician and surgeon, with an undertaking by the landlord in the lease preventing a saloon being placed in the building. This term is to end May 1, 1896. October 30, 1895, this bill was filed to enjoin a breach of that undertaking.

Such a relief is analogous to a decree for a specific performance. High on Inj., Sec. 1134.

The only purpose of an interlocutory injunction is to protect the complainant until the merits can be determined. If he can have no relief at the hearing, he can have no interlocutory injunction. High on Inj., Sec. 5.

We have held that a landlord might have an injunction to prevent the violation by his tenant of such a restriction upon the use of demised premises. Bryden v. Northrup, 58 Ill. App. 233.

So has the Fourth District. Star Brewery Co. v. Primas, 59 Ill App. 581.

And the principle applies in favor of the tenant as to other parts of the same building, though not included in the demise. Postal Tel. Cable Co. v. Western Union Tel. Co., 51 Ill. App. 62; 155 Ill. 335.

An interlocutory injunction granted without notice upon the filing of the bill was dissolved, as well it might be, both because granted without notice, with no showing that cause for so doing existed, (Sec. 3, Ch. 69, Injunctions,) and because the verification of the bill was a nullity.

The complainant swears that he "knows the facts therein stated, and that all and each of said facts are true." Facts must be true, but which allegations of the bill are of real facts, and which are of fiction?

The meaning of the English language can not be changed by the one isolated decision in Whelpley v. Van Epps, 9 Paige 332. But whether that injunction was properly dissolved is not a question for decision here, as no appeal lies from an order dissolving an injunction. Taylor v. Kirby, 31 Ill. App. 658, has been often followed in this court. So

all that is here said about the granting of the interlocutory injunction is but advisory.

On dissolving the injunction the court dismissed the bill for want of equity.

Whether that was rightly done depends upon the showing made by the bill itself, not upon the verification of it, nor the answer to it.

If the allegations of the bill made a case, the appellant had the right to try to prove them.

And we have not been referred to any valid objection to the frame of the bill. The right or wrong decision of the court in dissolving the interlocutory injunction had no influence upon the character of the relief which might be given to the appellant by a final decree.

If there was some lack of precision, or of sufficient explanation, in some allegations of the bill, it should not be dismissed for want of equity on such ground, but they being pointed out, leave to amend should be given, if asked; if not asked, then the dismissal might follow. It is quite apparent, however, that the bill was not dismissed because of any supposed insufficient statement of the case of the appellant, but because it was supposed he had no case to state. The lease, made an exhibit to the bill, purports to have been signed by agents in their own name of business, though in the body it purports to be a demise from Bedessern. He, by answer, denied the authority of the agents to put the restrictive clause in the lease. The irregularity in the mode of execution was no obstacle to equitable relief, if the agents had authority, and whether they had or not was a question to be tried.

The greatest difficulty we have with the case, is that the term had but six months to run when the bill was filed. There is some discretion in the exercise of equity jurisdiction, even on appeal. *Curtis v. Brown*, 29 Ill. 201. More in the first instance. *C., B. & Q. R. R. v. Reno*, 113 Ill. 39.

Considering the usual time required, or at least consumed, to dispose of a chancery cause, should a bill be entertained in a case that in six months will have nothing in it? We

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 Peterson v. Fleming.
 

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hesitate, but hold that the bill should not have been dismissed because of the short term of the lease.

The decree is reversed and the cause remanded, notwithstanding that the six months have wasted to six weeks. Reversed and remanded.

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### Hattie E. Peterson v. Patrick H. Fleming.

68	357
69	38
63	357
167	468

1. **EQUITY**—*Jurisdiction Where the Remedy at Law is Incomplete.*—A court of equity is the proper forum for the enforcement of agreements where the remedy at law is incomplete or inadequate, or can only be had through a multiplicity of suits.

2. **SAME**—*Jurisdiction to Enforce a Contract for the Payment of Alimony.*—Courts of equity have jurisdiction to entertain bills to enforce compliance with the terms of a contract to pay alimony at a stated sum at stated periods.

**Bill for Relief.**—Error to the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the March term, 1896. Reversed and remanded. Opinion filed March 31, 1896.

#### STATEMENT OF THE CASE.

This is a proceeding by writ of error to reverse a decree of the Circuit Court sustaining a general demurrer to the bill of complaint, filed by the plaintiff in error against the defendant in error, and dismissing the bill for want of equity.

The bill alleged the marriage of the parties in August, 1890, and a subsequent divorce by decree of the Circuit Court on February 26, 1892, granted in favor of the plaintiff in error upon her bill for that purpose; that by said decree it was found that the defendant in error had been guilty of adultery as charged; that the complainant therein (the plaintiff in error here) be allowed to resume her maiden name of Hattie E. Peterson; that the defendant therein (the defendant in error here), pay to said complainant the sum of \$125 a month, as alimony; that subsequent to the

entering of said decree and on the next day, an agreement in writing was entered into between the said parties, which agreement, omitting attestation clause, signatures and seals, was as follows :

“ This agreement, made and entered into this 27th day of February, A. D. 1892, by and between Patrick H. Fleming, of Chicago, Cook county, Illinois, party of the first part, and Hattie Elizabeth Peterson, formerly wife of said Fleming, of the same place of residence, party of the second part, witnesseth, that

Whereas, at the February term of the Circuit Court of Cook County, Illinois, on the chancery side thereof, in the suit numbered 98,207, in which Hattie Elizabeth Fleming, now Hattie Elizabeth Peterson, party of the second part herein, was complainant, and said Patrick H. Fleming, party of the first part herein, was defendant, a decree of divorce, and for alimony, was entered in favor of said second party; and

Whereas, it is understood and agreed by the parties hereto, that the party of the first part is to pay to the party of the second part as a permanent alimony under said decree one hundred and twenty-five (\$125) dollars per month, payable quarterly in advance at the office of M. R. Freshwaters, Chicago, Illinois, commencing on the 1st day of March, 1892, and continuing until said Hattie Elizabeth Peterson, said second party, shall decease, or until she shall again marry, or in writing consent to a reconveyance of certain property below described, which is offered and accepted as security for such monthly payments, or shall receive a conveyance in fee simple of said real estate below described, in full satisfaction and settlement of all claims and demands against the party of the first part.

Now, therefore, in consideration of one dollar (\$1) in hand paid to the party of the first part, the receipt of which is hereby acknowledged, and in further consideration of the full satisfaction and discharge of record of the decree for alimony against said party of the first part in the suit above referred to, the party of the first part hereby agrees and

binds himself to pay to the party of the second part one hundred and twenty-five (\$125) dollars per month, payable quarterly in advance, on the first day of each third month succeeding the date hereof, until said party of the second part shall decease, or shall again marry, or shall release the party of the first part from such payment in writing, according to the terms of a certain trust deed bearing even date herewith, under the terms of which John C. Richberg, of Chicago, Cook county, Illinois, is appointed trustee of certain real estate below described.

The payment of said sum of money is secured by the conveyance of certain real estate situated in the city of Chicago, Cook county, Illinois, and described as follows: Lots thirty-five (35) and thirty-six (36) north, range thirteen (13) east of the third principal meridian; also lot fifteen (15), in sub-block 1 of block forty (40), in the Canal Trustees' subdivision of the west half, and west half of the northeast quarter of section seventeen (17), township thirty-nine (39) north, range fourteen (14) east of the third (3d) principal meridian; all the above described property being in Cook county, Illinois. Under the terms of which trust, upon default of payment for a period of fifteen (15) days of the sums herein agreed to be paid, said trustee is authorized and empowered, on demand being made in writing to him or to his successor in trust, to convey the title in fee simple to said party of the second part, and in the event of such conveyance being made to the party of the second part in fee simple, then and in that event such conveyance shall be considered in full satisfaction and discharge of said payments of one hundred and twenty-five dollars (\$125) per month and such payments shall thereupon cease."

The bill also alleged, that in pursuance of said agreement, contemporaneous therewith, and as part and parcel thereof, and for the purpose of securing the payment of said annuity or permanent alimony in accordance with the terms of said contract, as the same should become due, a deed of trust was duly executed, acknowledged and delivered by Johanna Fleming and Edward Fleming, her hus-

band, and the trust therein and thereby created, was duly accepted by John C. Richberg, the trustee named in said trust deed, by an instrument in writing and under seal, which said deed of trust and acceptance thereof, omitting the attestation clauses, signatures, seals and certificates of acknowledgment in each, were and are as follows:

"This indenture witnesseth, that the grantors, Johanna Fleming and Edward Fleming, her husband, of the city of Chicago, Cook county, Illinois, for and in consideration of the sum of one dollar (\$1), and other good and valuable considerations, the receipt of all which is hereby acknowledged, convey and warrant to John C. Richberg, of the city of Chicago, Cook county, Illinois, the following described real estate, to wit: Lots thirty-five (35) and thirty-six (36), in block forty (40), in a subdivision of the south half of section ten (10), township thirty-nine (39) north, range thirteen (13) east of the third principal meridian; also lot fifteen (15), in sub-block one (1), of block forty (40), in the Canal Trustees' subdivision of the west half, and west half of the northeast quarter of section seventeen (17), township thirty-nine (39) north, range fourteen (14) east of the third principal meridian; all the above being in Cook county, Illinois, situated in the city of Chicago, Cook county, Illinois, hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of this State.

Whereas, on the 27th day of February, 1892, an agreement was entered into between Partick H. Fleming, of Chicago, Cook county, Illinois, and Hattie Elizabeth Peterson, formerly wife of said Patrick H. Fleming, for a good and valuable consideration, under the terms of which said agreement said Patrick H. Fleming agrees to pay said Hattie Elizabeth Peterson one hundred and twenty-five dollars (\$125) per month, payable quarterly in advance as a permanent alimony, commencing on the 1st day of March, 1892, and continuing until said Elizabeth Peterson shall die, or until she shall again marry, or shall consent in writing to a reconveyance to the grantors herein of the real estate above described; and

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Whereas, it is the intention and desire of the grantors herein to secure prompt payment of the sums of money to be paid by the said Patrick H. Fleming to Hattie Elizabeth Peterson as aforesaid, or in default being made from any cause in said payments to fully and wholly satisfy and discharge the claim of Hattie Elizabeth Peterson by the conveyance to her of the real estate above mentioned, as hereinafter provided, and for such purpose this conveyance is made in trust to said John C. Richberg (and in case of his death, removal, or inability to act, then Charles B. Moore, of Cook county, Illinois, is hereby appointed as his successor in trust), with the following powers and authority, to wit:

It is the intention and desire that the title in fee simple to the above described real estate shall be vested in said John C. Richberg, trustee, or his successor in trust, until the death of said Hattie Elizabeth Peterson, or until she shall again marry, or until such time as she may, in writing addressed to said trustee, request the conveyance of said real estate to said grantors, their heirs, administrators or assigns, unless as hereinafter provided and excepted.

The buildings on said premises above described shall be kept in good order and repair, and in tenantable condition, and be kept insured in the name of said trustee, or as his interest may appear, for the full insurance value thereof in one or more responsible fire insurance company or companies represented by the board of underwriters of Chicago, Illinois, and in the event of the destruction by fire of any building or buildings on said premises, the same are to be repaired or rebuilt or replaced with buildings on said premises of an equal value to those now upon said premises to the extent of such insurance money received.

All taxes and assessments that may be levied against such property, or any part thereof, shall be promptly paid, and if not paid when due, then the trustee is hereby authorized to collect a sufficient amount of the rents arising out of said premises to pay such insurance, taxes and assessments.

In the event of said monthly amounts of money are paid

to said Hattie Elizabeth Peterson until she shall decease, or until she shall again marry, or until she shall direct the reconveyance of said real estate as herein specified, then upon the happening of either of these events, the trustee herein shall reconvey said real estate to the said Johanna Fleming, her heirs, assigns or legal representatives, free from all claims, right, title and interest of said Hattie Elizabeth Peterson, it being understood that the benefits arising from said agreement and under this trust deed to said Hattie Elizabeth Peterson shall be personal to her and shall not inure to the benefit of her heirs or assigns.

In the event of default, however, in the payment of said monthly installments of money agreed to be paid by said Patrick H. Fleming, for a period of fifteen (15) days after the same become due by the terms of said agreement, then at the option of said Hattie Elizabeth Peterson, on demand made by her in writing to said trustee, John C. Richberg, or his successor in trust, for the conveyance to her in fee simple by a special warranty deed to all of said above described real estate, with all rents and appurtenances thereunto belonging, the said trustee or his successor, or his successor in trust, is authorized, directed, and is hereby specially empowered upon such demand in writing, to convey to Hattie Elizabeth Peterson as aforesaid, all of said real estate herein above described, the same to be for her sole use and separate estate, and such conveyance so made shall be in full satisfaction of her said claim of one hundred and twenty-five dollars (\$125) per month against Patrick H. Fleming, and said payments shall thereafter be discontinued, and upon said conveyance as aforesaid being made to said Hattie Elizabeth Peterson, she shall thereafter become entitled to the full use and benefit of said premises in fee simple, and upon said conveyance being made by said trustee he shall be fully released and discharged from said trust, and said trust shall thereupon cease."

"Know all men by these presents, that I, John C. Richberg, of Chicago, Cook county, Illinois, in consideration of one dollar (\$1) to me in hand paid, the receipt of which is



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hereby acknowledged, being the same person designated in the above and foregoing conveyance made by Johanna Fleming and Edward Fleming, her husband, dated February 27, 1892, whereby certain real estate therein designated is conveyed to me in trust, do hereby accept said trust and the duties and obligations therein and thereby imposed upon me, and agree to faithfully discharge the duties of said trust according to the provisions of said trust deed hereinabove set forth."

Said bill further alleged that said trust deed and said acceptance were duly recorded in the recorder's office of Cook county, Illinois; that from the date of said contract and said trust deed, said permanent alimony of one hundred and twenty-five dollars (\$125) per month has been paid in sums of three hundred and seventy-five dollars (\$375) each quarter until the payment due upon the first day of June, 1895.

That in the month of May, 1895, the said defendant expressed to complainant his wish to effect a settlement of said annuity by paying to complainant a lump sum, but that the offer made by said defendant was so wholly inadequate and so low in comparison with the true value of complainant's rights that such offer was declined; that on the 1st day of June, 1895, a quarterly installment of said annuity or permanent alimony, being \$375, became due and payable from the defendant, Patrick H. Fleming, to complainant; that payment has been demanded, but that defendant has refused to pay same or any part thereof, and complainant charges the fact to be that the defendant, knowing complainant to be in poor health, and wholly dependent upon the payment due by way of permanent alimony from said defendant, and being desirous of forcing complainant to accept in lieu of said permanent alimony a sum of money or other property wholly insufficient and much less in amount or value than the value of complainant's said annuity, has refused to make the payment due thereon, in order to take advantage of the necessities of complainant, and thereby force her to agree to such unfair and inadequate terms of settlement as defendant may choose to dictate; that the real estate de-

scribed in said trust deed is scant and insufficient security for the payment of said permanent alimony or annuity; that complainant is advised the present value of said annuity is about the sum of \$28,000 to \$29,000; that the value of said real estate is not over about \$7,000.

Said bill prays that an account may be taken of the amount due and unpaid upon said annuity, and that the same be ascertained; that the defendant be decreed to pay to complainant the amount of said annuity or permanent alimony as may, on such accounting, be found due and unpaid to complainant, and that the defendant, Patrick H. Fleming, be ordered and decreed to pay to complainant hereafter the quarterly installments of said annuity or permanent alimony as the same become due and payable, in accordance with the terms of said contract, and bill prays, in addition, for general relief.

COLIN C. H. FYFFE, attorney for plaintiff in error.

A bill will lie which seeks specifically to enforce a contract for the payment of an annuity. The proper relief to be granted is for the payment of arrears due and unpaid, and that defendant be required to pay the future installments as they come due, in accordance with the terms of the instrument creating the annuity. 1 Am. & Eng. Ency. of Law, 598, sub-tit. Annuity; 2 Story's Equity Jur. (13th Ed.), 41; Marshall v. Thompson, 18 Munf. (Va.), 412; Swift v. Swift, 3 Ir. Eq. Reports, 267; Manley v. Hawkins, 1 Drury & Walsh, 363; Cupit v. Jackson, 13 Price, 721; Clifford v. Turrell, 1 Younge & Collyer, 138; Keenan v. Handley, 2 De G. J. & S. 282; Carbery v. Weston, 1 Bro. Cas. in Parl. 429; Herbert v. Earl of Powis, Id. 355; Cooke v. Wiggins, 10 Ves., Jr., 191; Bower v. Cooper, 2 Hare, 408.

JOHN C. RICHBERG, attorney for defendant in error, contended that a party has no such standing in equity as will enforce the payment of money on a contract; the remedy is at law. C. & N. W. R. R. Co. v. Nichols, 57 Ill. 464.

Equity has no jurisdiction on a bill for relief (without a

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prayer for discovery) on a contract on which the plaintiff has a remedy at law, or, of a suit by a legatee to recover a debt which he took by bequest, or where mere confidence has been reposed or credit given. *Doyle v. Murphy*, 22 Ill. 502; *Thomas v. Caldwell*, 50 Ill. 138.

When the contract is a personal contract between the parties as individuals, the remedy is adequate at law. *Wenden v. Graham*, 107 Ill. 169.

In all cases of doubtful character parties should be permitted to whatever remedy they have at law although equity might entertain jurisdiction. *Wing v. Sherer*, 77 Ill. 200; confirmed in *Hacker v. Barton*, 84 Ill. 313; *Anderson v. Chilson et al.*, 65 N. W. Rep. 435.

Where a court of law has jurisdiction the complainant must show that the case falls within some exception to the rule. *Douglas v. Martin*, 103 Ill. 25.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The question as presented by the record, is whether the bill made a case for equitable jurisdiction.

The agreement provides for the payment by the defendant in error of the sum of \$125 a month, payable quarterly in advance, and it would seem that the law governing in cases of personal annuities is applicable. Undoubtedly the plaintiff in error might, on the recurrence of each successive quarter, sue at law for the amount due to her under the contract, but to require her so to do would be to multiply suits at the rate of four each year, and involve her in great expense and harassment, and would be a most ineffectual and inadequate remedy for her.

Or she might perhaps have a remedy at law by a suit to recover in a lump sum the present value of the annuity, if it may be so termed, but there would be much difficulty in determining what that value is. There are two contingencies upon which her right to receive the payments may terminate, one death, the other re-marriage.

The expectancy of her life might be reasonably calculated by resort to annuity or life tables, but how about the other contingency of re-marriage?

There being no exhibit in the record that tends to inform us upon matters that might well enter into the calculations of a jury in determining so delicate a question, with her before them as a witness, we refrain from anything more than a suggestion of its difficulties.

Another, and perhaps more important objection to requiring the plaintiff in error to resort to a suit at law for the recovery in a single sum of the present value of the annuity agreed to be paid her, is that it would be in effect to compel her to accept an entirely different contract from the one she had agreed to.

These two methods for a remedy at law, and their incompleteness, are forcibly commented upon in *Swift v. Swift*, 3 Irish Equity Rep. 267, which was the case of a bill filed for the specific performance of an agreement to pay an annuity in quarterly installments, and in principle is a case in point.

All reasons that operate to confer jurisdiction in equity, in cases where the remedy at law is incomplete or inadequate, or can only be had through a multiplicity of suits, seem to unite in favor of a court of equity being the proper forum for the enforcement of the agreement in question.

The fact that security was given for the payments provided for in no way interferes with the enforcement in other ways of the terms of the contract.

The decree of the Circuit Court is reversed and the cause remanded.

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### William Hill v. Elma L. Hill.

1. **PRESUMPTIONS**—*In the Absence of a Complete Record.*—In the absence of what purports to be a complete record, the presumption exists, and must control, that the omitted parts of the record furnish sufficient grounds to support the decree.

2. **AMENDMENTS**—*Certificate of Evidence at a Subsequent Term.*—An amendment of a certificate of evidence incorporating evidence alleged to have been omitted from the original certificate, should not be allowed at a term subsequent to that at which the trial was had, unless there is something in the record to amend by.

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3. RECORDS—*When Insufficient to Warrant a Reversal.*—A transcript of a record certified pursuant to a præcipe signed by counsel, directing the clerk to insert certain papers, is not complete and is insufficient to justify the reversal of a judgment of a court of competent jurisdiction.

4. EVIDENCE—*Direct and Cross-Examination—Controlling Weight.*—Where a complainant in a divorce case testified positively that she resided in Cook county at the time she began her suit, but on cross-examination, to the question, "Your home is in Lake county, where you lived with your husband?" she answered, "Yes," *it was held* that the affirmative answer to a question in such words was not to be given controlling weight as opposed to her direct testimony.

**Suit for Divorce and Alimony.**—Error to the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed March 31, 1896.

M. SALOMON, attorney for plaintiff in error.

The proceedings shall be had in the county where the complainant resides, but process may be directed to any county in the State. R. S., chapter 40, section 5; Davis v. Davis, 30 Ill. 180; Sommers v. Sommers, 16 Ill. App. 77; Spangler v. Spangler, 19 Ill. App. 28; Way v. Way, 64 Ill. 410.

The memorial paper or minute by which a record may be amended must be made and preserved as a part of the record pursuant to law. A private memorandum of a witness is not sufficient. Angus v. Backus, 58 Ill. App. 259; Dougherty v. People, 118 Ill. 164.

A. J. REDMOND, attorney for defendant in error; AVERY R. HAYES, of counsel.

Where one has been a resident of the State for one year, action for divorce may be brought in the county where the complainant resides, etc. Sec. 5, Divorce Act, R. S. Ill.

When a woman, for good cause, lives separate and apart from her husband because of the necessity of her separate and independent existence, thereafter her actual place of residence becomes her separate and legal domicile. Bowman v. Bowman, 24 Ill. App. 178; Chapman v. Chapman, 129 Ill. 389.

A resident of a place is one whose place of abode is there, and who has no present intention of removing therefrom. 21 Am. & Eng. Enc. of Law, 122.

It is largely a question of intention, and may be taken up or changed at will. *Behrensmeyer v. Kreitz*, 135 Ill. 635; *Blankinship v. Israel*, 132 Ill. 521.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

These proceedings, by writ of error, question a decree of divorce and alimony granted in favor of the defendant in error.

Although the plaintiff in error answered the bill, and appeared by counsel at the hearing, and cross-examined the defendant in error and her witnesses, he offered no evidence by way of defense.

It is especially insisted that it was not proved that defendant in error was a resident of Cook county, and therefore that the Circuit Court of that county was without jurisdiction.

The defendant in error testified positively that she resided in Chicago, Cook county, at the time she began her suit, and gave the name of the street on which she lived.

It is true that upon cross-examination she answered "Yes, sir," to a question put to her by her husband's solicitor, as follows: "Your home is in Lake county where you lived with your husband?" But we do not think an affirmative answer to a question in such words and form, ought to be given controlling weight, as opposed to her positive testimony. It is not disputed but that her home when living with her husband was in Lake county, and had been for ten or a dozen years, but we think it was sufficiently established that after she left her husband for his alleged and proved cruelties to her, she took up a legal residence in Cook county and resided there at the time her suit was begun.

The more serious question is that concerning the allowance of seven hundred dollars alimony in gross, that was made by the decree, and the question is made a serious one

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because of the paucity of evidence upon the subject of the property and income possessed by the plaintiff in error, so far as the same is made to appear by the certificate of evidence that was brought before us by the transcript filed in this court in the first instance.

By a supplemental record in the nature of an amendment to the original certificate of evidence, the trial judge certifies to us that on the hearing of the cause before him upon the question of alimony, it was stated to him in open court by the respective solicitors of both parties that "there has been an agreement between solicitors for complainant and defendant that a gross sum of seven hundred (700) dollars should be allowed as alimony for complainant."

Such amendment to the original certificate of evidence was made at the February term, A. D. 1896, whereas the cause was heard and the decree entered at the November term, A. D. 1895, two terms of court having intervened between the decree and the amendment, and the point is made that upon the authority of *Dougherty v. People*, 118 Ill. 160, and *Angus v. Backus*, 58 Ill. App. 259, the amendment is not properly before us, because it does not appear that there was anything in the record from which the amendment was made, or could have been made.

We are relieved from deciding the point because of the condition in which the original record is certified to us.

The transcript originally certified to this court by the clerk of the Circuit Court is certified as being "a true, perfect and complete transcript of the record prepared according to præcipe filed January 16, 1896, except Exhibit 'A' to answer."

The præcipe referred to in such certificate by the clerk is signed by counsel for plaintiff in error, and directs the clerk to prepare a transcript of the record of the case "and insert the following papers :

- 1st. Bill.
- 2d. Answer.
- 3d. Certificate of evidence.
- 4th. Decree."

It has been many times decided that a record so certified is not a complete one, and is insufficient to justify the reversal of the judgment of a court of competent jurisdiction. *Springer v. Maddock*, 59 Ill. App. 40; *Tolman v. Wheeler*, 57 Ill. 342, and cases there cited.

But looking back into the record to see what it is that by the certificate of the clerk is expressly excepted from his copy of the answer, we find, by an inspection of the answer, that Exhibit "A" therein referred to and stated as being attached to and made a part of the answer, is what is stated in the answer to have been an agreement "entered into between the parties as an adjustment of their property rights," and is what was alleged in the bill of complaint to be an agreement entered into between the parties settling their respective property rights, and which had been fraudulently procured by the plaintiff in error from the cashier of a certain bank, with whom it had been left by the parties to hold until plaintiff in error should pay a certain sum of money to the defendant in error.

Lengthy argument would not make it any plainer than the statement that has been made, that the paper filed, Exhibit "A," which is omitted from the record, may, quite probably—in fact, and in law must—be presumed to have afforded sufficient evidence to support that part of the decree concerning alimony.

It therefore becomes unnecessary to decide whether or not the supplemental or amended record is entitled to be considered by us, for the decree must be affirmed entirely irrespective of the fact thereby certified to us, upon the ground that, in the absence of what purports to be a complete record, the presumption exists, and must control, that the omitted parts of the record furnish sufficient grounds to support the decree.

The decree of the Circuit Court is therefore in all respects affirmed.



**Albert J. Stone and Mary S. Stone v. Albert M. Billings  
and Cornelius K. G. Billings, Trustee.**

1. **FRAUD**—*Representations as to a Legal Effect.*—A false representation as to the legal effect of a contract is not a fraud in law.

2. **FORECLOSURE**—*Partial Releases—Tender After Default.*—Under a trust deed, conditioned that the whole debt secured might be declared due and the deed foreclosed upon thirty days default in the payment of interest, taxes, etc., and containing a provision for partial releases, a tender to obtain such a release *pendente lite*, forty-five days after a bill to foreclose, and while grantors were in default in the payment of interest, taxes, etc., is unavailing.

3. **EQUITY PRACTICE**—*Exceptions to the Master's Report.*—Exceptions to the master's report must be specific and point out the evidence upon which the conclusion excepted to is based. *McMannomy v. Walker*, 63 Ill. App. 259.

4. **SOLICITOR'S FEES**—*In Foreclosure Suits.*—Under a trust deed providing for "a reasonable solicitor's fee to be fixed by the court," in fixing such amount, the examination should be directed to what is customary for such legal services where contracts have been made with persons competent to contract, and not what is reasonable, just and proper for the solicitor in the particular case. The inquiry should be, not what an attorney thinks is reasonable, but what is the usual charge.

**Foreclosure, of trust deed.** Error to the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed March 31, 1896.

FRANK J. CRAWFORD and C. D. F. SMITH, attorneys for plaintiffs in error.

An agreement to release any specified portion of the mortgaged premises upon the payment of a specified amount confers upon the mortgagors the right to have such portion released upon the payment of the amount. And if the mortgagors, or either of them, pay or tender the specified amount, there can be no foreclosure decree of sale of the parcel so agreed to be released. *Gould v. Equity Banking Co.*, 136 Ill. 60.

Where there is an agreement in the mortgage to release specified portions of the mortgaged premises on being paid

therefor certain specified sums of money, the mortgagors or their grantees are entitled to a release of such specified portions upon the payment or tender to the mortgagee of the specified amount, *without interest thereon*. Clark v. Fountain, 155 Mass. 464; S. C., 144 Mass. 287.

WINSTON & MEAGHER, attorneys for defendants in error; JAMES F. MEAGHER and SILAS H. STRAWN, of counsel.

Where a party of mature years and sound mind, being able to read and write, deliberately signs a written instrument without informing himself as to the nature of its contents, he can not be permitted to allege, as a matter of defense, his ignorance of that which it was his duty to know, where the means of information are within immediate reach, of which he neglects to avail himself, unless he was induced to do so by willfully false statements of the party procuring his signature. State Nat'l Bank of Springfield v. Butler, 149 Ill. 585; Linington v. Strong, 111 Ill. 160; Wheeler & Wilson v. Long, 8 Ill. App. 463.

The right to obtain a release by a payment of the sums set opposite the property in the schedule expired when they made default in the terms of the trust deed. Chrisman v. Hay, 43 Fed. Rep. 552; Reed et al. v. Jones et al., 133 Mass. 116; Werner v. Tuch, 52 Hun (N. Y.), 269; Pierce v. Kneeland, 16 Wis. 706.

A tender of debt, secured by a mortgage made after default, must be kept good in order to discharge the mortgage. Crain et al. v. McGoon, 86 Ill. 431; Aulger v. Clay, 109 Ill. 487; Blain v. Foster, 33 Ill. App. 298.

Where the tender is relied on, the bill must aver a tender and offer to bring the money into court. D'Wolf v. Pratt et al., 42 Ill. 215; Mohn v. Stoner, 11 Iowa 30.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The defendants in error filed their bill to foreclose a trust deed in the nature of a mortgage executed by the plaintiffs in error, who are husband and wife, to secure, with a com-

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paratively small exception, a debt already in judgment against the plaintiffs in error, for which a new note was given. It is doubtless true that the debt was originally wholly that of the husband, and that she might have procured the vacation of the judgment so far as it affected her, so that in executing the new note and the deed, she only became surety for him; yet her charge of fraud is not strengthened by that relation. *Edwards v. Schoeneman*, 104 Ill. 278. The note was payable on or before three years after March 1, 1894, with semi-annual interest. When both considered, the note and deed provided that upon thirty days default in the payment of interest or taxes, etc., the whole might be declared due, and the deed foreclosed. The fraud she charges is that she was told that the note gave three years time. At the most, that was but a representation as to legal effect; not of fact. Besides, it is true, no one would expect a creditor to wait three years with no interest, and suffer his security to vanish by tax sales, without any provision for his safety. Had the plaintiffs paid the interest, taxes, etc., they would have had three years.

The other complaint as to the deed itself is, that it contains provision for partial releases with which the defendant refused to comply. The tender to obtain such release was made *pendente lite* forty-five days after the bill was filed, and the plaintiffs were very considerably behind, not to say in default, in the payment of interest, taxes, etc. Under such circumstances, no release could be claimed. *Lane v. Allen*, 60 Ill. App. 457.

The plaintiffs' excuse as to the default in the payment of interest and taxes is, that in their note was included \$5,300 for which the defendants held the note of a third person, guaranteed by the plaintiff Albert, which being paid, it was agreed that the money should be used for the taxes and interest, and there being more than enough to pay the taxes, the surplus should be applied toward the September interest, and that the defendants agreed not to enforce the provisions of the deed as to that interest.

Now suppose that all true. Had the plaintiffs when, or

within a reasonable time after, the bill was filed, brought into court all arrears, and offered to pay them, it may well be that they would have been entitled to a stay of proceedings, partial release, and perhaps a dismissal of the bill with costs.

But doing nothing and offering to do nothing, they have no defense.

By judicial legislation a mortgage in New York is whittled down to a mere lien. Here it is, as between the parties, after breach at least, the legal estate. *Hall v. Lance*, 25 Ill. 277; *Abney v. Austin*, 6 Ill. App. 49.

Citing New York law as to the effect of the tender made is not to the point. *Kortright v. Cady*, 21 New York 343, and *Jones v. Guaranty Co.*, 101 N. S. 622, involving New York law, are not authority in this State.

The thirteen exceptions filed to the master's report point to no evidence upon which the master based his conclusions (*McMannomy v. Walker*, 63 Ill. App. 259), and if they did the abstract is barren. *Bishop v. Loewus*, 63 Ill. App. 351.

We do not look beyond the opening brief of the plaintiffs for reference to errors in the decree. *Ætna Iron Works v. Owen*, 62 Ill. App. 603.

The decree of foreclosure is affirmed.

MR. JUSTICE SHEPARD.

It is to me a matter of regret that there has been such a failure by the plaintiffs in error to observe well-established rules, as to preclude this court from, as I think, reversing the decree, at least in part, for what I regard were material errors, by including in the foreclosure decree the attorney's fee of \$500, that was embraced in the judgment at law entered by confession, and what I regard as an excessive allowance of \$7,500, in addition, for solicitor's fees in the foreclosure suit.

The authority to allow any solicitor's fee in the foreclosure suit was conferred by the terms of the trust deed, which provided that out of the proceeds of the sale there should be paid, among other things, "reasonable solicitor's fees to be fixed by the court."

The evidence upon which the allowance of \$7,500 was made consisted in the testimony of one of complainant's counsel and two other practicing lawyers.

Complainant's counsel testified that in his opinion "the sum of \$7,500 to \$10,000 would be a fair, reasonable, just and usual charge," taking into consideration the amount involved, the responsibility, and the work necessarily done, etc.

The two other witnesses were duly qualified as such, and answered, with reference to the questions that were propounded to them, with reference to what were "fair, reasonable, usual and just charges," amounts which, it may be conceded, justified the finding of the master, if the amount alone were to be considered.

In *Reynolds v. McMillen*, 63 Ill. 46, it was said: "In fixing the amount of a reasonable fee, the examination should be directed to what is customary for such legal services where contracts have been made with persons competent to contract, and not what is reasonable, just and proper for the solicitor in the particular case. The inquiry should be, not what an attorney thinks is reasonable, but what is the usual charge."

And again in *Heffron v. Gage*, 149 Ill. 182 (at page 192), such rule is seemingly approved.

I do not think a mingling of what is "usual" with what is "fair and reasonable" in either question or answer, is an observance of the rule. What is "reasonable" is matter of opinion, while what is "usual" is matter of fact, and between the two the fact should prevail over the opinion. They are not subjects that can be properly embraced in either a single question or single answer, for they may be, and are likely to be, quite opposed to one another.

It was said in *Stanton v. Ebery*, 93 U. S. 548 (at page 557), paraphrasing what was said in *Vilas v. Downer*, 21 Vt. 219: "Attorneys and solicitors are entitled to have allowed to them for their professional services, what they reasonably deserve to have for the same, having due reference to the nature of the service and their own standing in the profession for learning, skill and proficiency; and for the purpose of aiding the jury in determining that matter,

it is proper to receive evidence as to the price usually charged and received for similar services by other persons of the same profession practicing in the same court."

Conceding everything that might be urged with reference to the high standing of complainant's solicitors, my opinion, upon a consideration of all that appears, is that they should not have been allowed so large a sum for services in this case.

The record does not disclose services, either as to extent of time expended, or of complexity of legal questions, which justify what, in my opinion, based upon an experience of thirty-five years at this bar, is a most unusual charge for similar services. See, in this connection, the case of *Blake v. Blake*, 70 Ill. 618 (at page 628).

When authority is conferred, as was done by the mortgage in this case, to allow "reasonable solicitor's fees to be fixed by the court," some regard should, in my opinion, be paid to the equitable position, which, in the eye of the law, a mortgagor occupies, and especially where, as here, one of the mortgagors, Mrs. Stone, appears to have been a surety.

Full indemnity is all that a mortgagee has a right to as against the mortgagor.

I can not but think that had the inquiry of the court been in conformity to the truly equitable rule required in cases of fees for services in dissolving an injunction (*Jevne v. Osgood*, 57 Ill. 340)—"What has the defendant (complainant) paid, or become liable to pay, and is it the usual and customary fee for such services,"—I should have had no opportunity or inclination to indulge in this protest (for in the condition of the case as presented to us, my remarks are scarcely more than a protest), against a rapidly increasing tendency, not at all confined to this case, to fasten upon unfortunate mortgagees under the letter of their mortgage stipulations or contracts, fees that are oppressive and exorbitant, and which in my mind are in the nature of obnoxious penalties.

MR. JUSTICE WATERMAN.

I do not think that the mortgagee can, by any action upon

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his part, enhance the amount which is to be allowed for solicitor's fees. The question is not what solicitors of the character and standing of those the mortgagee has employed should receive for the work done in the case, but what is the customary compensation of lawyers for such services; and I agree with Judge Shepard in saying that the question propounded to witnesses, which the court is to determine, is not what is fair, just or reasonable, but what is usual and customary. Affirmed.

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**Henrietta Snell v. John J. Owen and Ida Davis.**

1. *LEASE—Terminated by Judgment of Restitution—Responsibility of Guarantor.*—A judgment of restitution in a suit of forcible detainer for the possession of leased premises puts an end to the lease, and a guarantor on the lease is not responsible for rent accruing after such termination.

**Suit**, for rent. Appeal from the County Court of Cook County; the Hon. CHARLES A. BISHOP, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed March 31, 1896.

F. L. SALISBURY, attorney for appellant.

W. H. POPE, attorney for appellee.

The service of the notice and the bringing the suit in forcible detainer was an election by appellant to determine the lease, and it did determine it. *Oldershaw v. Holt*, 12 Adol. & E. 590; *Leavy v. Pattison*, 66 Ill. 203; *Chadwick v. Parker*, 44 Ill. 326.

Whenever a party seeks the aid of a court of justice to enforce his rights and submits his case and objections to the decision of a court, and invites it to decide upon them, and makes no objection to the jurisdiction until after the court has heard and adjudicated, he is estopped from subsequently objecting to its decision and the proceedings taken thereon. *Brown v. Haines*, 12 Ohio 1; *Ela v. McConihe*, 35 N. H. 729.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the County Court,

rendered there in favor of the appellant upon appeal by the appellees from a justice's judgment against them.

Although there were no pleadings, the proof showed the action to be upon the covenants to pay rent contained in a certain lease from the appellant to the appellees. The claim was for rent for the months of February, March and April, 1894, at the rate of \$61 a month, as owing by both of the appellees. The judgment was for \$61, or one month's rent, and was against the appellee Davis alone.

In March, 1893, a suit in forcible detainer was brought by the appellant against the appellees for possession of the leased premises, and a judgment of restitution recovered. That judgment operated to put an end to the lease. *Johannes v. Kielgast*, 27 Ill. App. 576.

Notwithstanding the lease was thus terminated, it seems that the appellee Davis stayed in possession of the premises and paid rent therefor for some time thereafter, but for how long a time does not appear. It was, presumably, on account of such occupation that the court gave judgment against her.

Mere evidence that there was three months rent due and unpaid under the lease that was terminated long before such three months, without any proof of how long the premises continued to be occupied by either appellee after such termination, affords no ground for the appellant to complain that the judgment in her favor was not for enough.

It is not material that the County Court found that the appellee Owen was a guarantor on the lease and therefore, on that ground, dismissed the suit as to him. He was properly dismissed out of the suit, because the lease signed by him was terminated by the act of the lessor long before any of the rent claimed accrued, and there was no evidence that he was ever in possession of any part of the premises, either before or after the lease was terminated.

The judgment and proceedings in the forcible detainer suit were regular, and were properly proved, and we find no sufficient error in the record to warrant a reversal of the judgment.

It will therefore be affirmed.



Continental Investment & Loan Society v. August Schubnell.

63	379
108	481

1. MOTION FOR A NEW TRIAL—*Must be Preserved in a Bill of Exceptions.*—A motion for a new trial, and the ruling of the court thereon, and the exceptions, if any are taken, must be preserved by a bill of exceptions. The fact that the clerk, in making up the transcript, copies the motion into the record, outside of the bill of exceptions, will not avail.

2. PRACTICE—*Exceptions in Gross.*—Exceptions in the court below can not be taken in gross.

**Assumpsit**, for balance due withdrawing stockholder. Error to the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed March 31, 1896.

A. B. DAVIS, JR., attorney for plaintiff in error; GRAHAM HARRIS, of counsel.

No appearance for defendant in error.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This writ is prosecuted to obtain the reversal of a judgment in favor of the defendant in error, recovered in a suit brought for a balance claimed to be due upon the withdrawal by the defendant in error from membership in the plaintiff society.

The proof showed that the defendant in error became a member of the society and paid, upon the shares of stock for which he subscribed, the sum of \$306, in monthly installments of \$18 each, and borrowed from the society the sum of \$200. The judgment was for the difference between the amount he borrowed and the sum he paid in.

Some interesting questions of law are contained in the record, which might be decided in favor of the plaintiff in error had they been properly saved by the record brought to us. But following the settled doctrine, we can not dis-

turb the judgment for such errors of law, if they exist; and it is with trifling regret that we are constrained to apply the doctrine where, as here, the judgment is so nearly an equitable one.

The bill of exceptions contains no mention of a motion for a new trial or the action of the court taken thereon.

The ruling is uniform that the motion for a new trial and the ruling of the court thereon, and the exceptions, if any are taken, must be preserved by bill of exceptions; and the fact that the clerk has seen fit to copy into the transcript, outside of the bill of exceptions, a document which purports to be a motion for a new trial, will not avail against the lack of the motion and the ruling thereon, and exceptions thereto, appearing in the bill of exceptions. *Harris v. The People*, 130 Ill. 457; *Graham v. The People*, 115 Ill. 566; *James v. Dexter*, 113 Ill. 654; *Tarble v. The People*, 111 Ill. 120; *Foreman v. Johnson*, 37 Ill. App. 452; *Burnett v. Snapp*, 39 Ill. App. 237.

But had the motion for a new trial been properly preserved, there would have arisen another fatal objection in matter of form, to the consideration of the questions of law that have been argued.

To the refusal by the court to give five asked instructions and two special findings of fact, but a single exception, in gross, was taken. Exceptions can not be taken in that way. *Flaningham v. Hogue*, 59 Ill. App. 315; *E. St. L. Electric Co. v. Cauley*, 148 Ill. 490.

The judgment of the Circuit Court is affirmed.

63	380
66	636
63	380
79	288

### Richard Messerschmidt et al. v. Nelson A. Cool et al.

1. PRESUMPTIONS—*In Favor of Jurisdiction*.—While presumptions may exist in favor of the finding of a court of competent jurisdiction when the matter upon which the finding is based is not shown, the rule is otherwise where, by its order, judgment or decree, the very matter upon which it has acted is documentary and shown, and it clearly appears from such matter that the finding is void.

Messerschmidt v. Cool.

2. EQUITY PRACTICE—*Complainant Entitled to no Relief—Dismissal.*  
—A complainant not entitled to any relief under his bill has no ground of complaint if his bill is dismissed for whatever cause.

3. ERROR—*What can not be Assigned as.*—A party can not assign for error that which does not prejudice his rights.

**Bill to Redeem, etc.**—Error to the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed March 31, 1896.

NEWMAN, NORTHRUP & LEVINSON, attorneys for plaintiffs in error.

CHARLES S. HARMON, attorney for defendant in error  
Nelson A. Cool.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The plaintiffs in error filed their bill in equity to redeem from a foreclosure sale of certain premises, alleging certain facts and circumstances of an equitable character upon which they relied for the relief they prayed.

By their original bill, they showed that the decree under which the premises had been sold was entered on July 18, 1892, for the sum of \$14,385.08, and alleged the making of a tender of said sum, with five per cent interest from said July 18th, and a refusal thereof; and, admitting their right to redeem only upon payment of the decree with interest, they offered by their bill to pay said amount.

The tender and offer to pay, as made by their bill, was as follows: "That your orators are entitled to redeem said premises upon payment to said Cool of the sum of fourteen thousand three hundred eighty-five and 08.100 (\$14,385.08) dollars, with interest thereon from July 18, 1892, at five per cent per annum; and your orators hereby tender in open court to the said Nelson A. Cool, and offer to pay to said Cool, said sum with interest as aforesaid, in redemption of said premises as aforesaid."

The bill was filed June 11, 1895, and on July 10, 1895, Cool, the defendant, there as here, filed a general demurrer thereto.

No action having been taken upon the demurrer, and no answer having been filed, the complainants (plaintiffs here) obtained leave of court, by order entered October 16, 1895, to amend their bill within five days from that date, and such amended bill was filed on October 21st.

The amended bill charged in substance the same facts as were set up in the original bill relating to the making of a contract by the defendant Cool, for the purchase back of the lands in question, at a price largely in excess of the mortgage then in process of foreclosure by him, but stated more specifically the damages sustained by complainants by the refusal of Cool to carry out said contract, and alleged that such damages amounted to \$9,990.24, and insisted that they constituted a proper subject of set-off and consideration in an account between the parties; and after stating in somewhat different language the offer to redeem made by complainants before the bill was filed, proceeded to renew their tender and offer to pay, but only for the amount of the foreclosure decree and interest lessened by the amount of said damages.

On October 16, 1895, which was the date of the order giving complainants leave to amend their bill as aforesaid, the court entered another order, which, after reciting the appearance of the parties by their solicitors, was as follows:

"And it appearing to the court, from the complainant's bill filed herein, that they seek to redeem the premises in said bill described from the sale had on the 16th day of August, 1892, under a decree of foreclosure set forth in said bill, and it appearing that the complainants, in and by their said bill, have tendered or offered to pay the amount of such sale and interest in redemption from such sale, and the defendant, Nelson A. Cool, by his solicitor, now here in open court signifies his willingness to accept the money so tendered and to allow a decree of redemption to be entered herein. On motion of said defendants it is ordered that the said complainants pay into court the amount of such sale, together with interest, within ten days, and that failing so to do said bill of complaint be dismissed."

On October 26th, which was the date of the expiration of the order last named, the complainants filed two motions, one of which was that the order requiring the payment into court of the amount of the sale be modified so as to require them to pay only the amount tendered by their amended bill, filed October 21st, and the other was for the entire vacation of such order.

But the court denied both of said motions, and on November 16, 1895, to which time the order of October 16th was recited to have been extended, the court, on motion of defendant, dismissed both the original and amended bill for want of compliance by complainants with said order.

From that decree of dismissal this writ is prosecuted.

The record is absolutely devoid, even by way of suggestion, of anything from which it can be seen, or inferred, what the amount of the foreclosure sale was.

The bill nowhere states it, the defendants never answered, no affidavits are shown in the record, and the order itself which required its amount, with interest, to be paid, is as silent on the subject as is everything else that is before us. The foreclosure decree under which the sale was made, was entered in the Superior Court, whereas this order was made by the Circuit Court, and it does not seem that the Circuit Court could have acquired knowledge, through the permeating influence of judicial notice, of what the records of the Superior Court showed.

It would seem, in the opinion of the writer, that an order is void for want of certainty which requires the payment of an amount of money not stated in the order, and not capable of ascertainment from anything that appears in the record of the cause in which the order is made, and that being void all acts based upon it are likewise void.

And, furthermore, that because the order requiring the amount of the sale, with interest, to be paid into court was not in accordance with the tender that was made by either the original or the amended bill, its violation should not have been punished by a dismissal of the bills, without some determination of the merits of the case either upon the law or the facts.

In this instance, the tender and offer to pay, made by the original bill (much lessened by the amended bill), was of the amount of the foreclosure decree with interest, and not of the amount of the foreclosure sale with interest. To require the payment of the latter when only the former was tendered, was to require what the writer thinks was unjustified by anything in the record. The amount of the sale may have been materially greater than the amount of the decree. The addition of costs alone, would have made a material increase in the sum.

The recitals of the order exclude all presumption of anything having been before the court, except what was shown by the bill itself, with reference to what was tendered by the complainants.

While presumptions may exist in favor of the findings of a court of competent jurisdiction where the matter upon which the findings are based is not shown, the rule is otherwise where, by its order, judgment or decree, the very matter upon which the court has acted, is documentary and shown, and it clearly appears from such matter that the finding is false.

It appearing, however, to the majority of the court, that no case for equitable relief was made by either the original or amended bill, the decree dismissing them was properly made, even though made for an insufficient reason, viz., the failure by complainants to comply with the order to pay into court the redemption money, as therein directed.

And this conclusion is based upon the doctrine that a complainant not entitled to any relief under his bill has no ground of complaint if the bill be dismissed for whatever cause.

The decree is therefore affirmed.

MR. PRESIDING JUSTICE GARY.

Loose, vague and ambiguous as are the averments of the bill in regard to a contract with Cool for a repurchase of the premises, no doubt the complainants intended them to be understood as charging that such a contract was made

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Assume that to be true, and what follows? Simply that the complainants had an election to recover at law their damages for a breach of the contract by Cool, or to go into equity for a specific performance. But the fact that Cool broke the contract did not warrant the complainants to ask the court to make a new contract, under which the complainants might redeem and retain themselves the premises upon any terms never agreed to by Cool, instead of Cool having them upon terms which he had agreed to. The bill was therefore for a kind of relief to which the complainants had no right, and so the dismissal of the bill was no injury to them. In principle the appellant's offer is like Rigdon's in *Rigdon v. Walcott*, 141 Ill. 649. Error, however gross, without injury, is no cause for reversing any decree. *Mann v. Brady*, 67 Ill. 95; *Wilcox v. Raddin*, 9 Ill. App. 594.

"A party can not assign for error that which does not prejudice his or her rights." *Farnan v. Borders*, 119 Ill. 228.

The same principle in *Penn. Coal Co. v. Kelly*, 156 Ill. 9.

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### Ellen B. Hogan v. Kate Hogan Wallace.

63	385
166a	328

1. **AMBIGUITIES—*Latent, Appearing in Instruments.***—Where a latent ambiguity appears in a certificate of a fraternal beneficiary association as to the beneficiary intended, and an attempt is made to identify such beneficiary, the testimony of the person who drew the application for membership in such association is admissible to show the circumstances under which the certificate was made, but testimony as to what the deceased member, after the making of the certificate, said as to his intentions is not.

**Bill of Interpleader.**—Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 13, 1896.

## STATEMENT OF THE CASE.

This was a bill of interpleader filed by the High Court of the Independent Order of Foresters, against the appellant, Ellen B. Hogan, and the appellee, Kate Hogan Wallace.

The complainant is a fraternal and benevolent organization, the object of which is "to give charitable and moral aid to its members, and to secure pecuniary aid to the widows, orphans, heirs and devisees of deceased members of said order."

On August 6, 1884, it issued its certain benefit certificate in the sum of \$1,000 to one Michael Hogan, now deceased, said sum being payable at his death to "Mrs. Kate Hogan, his wife." In 1872, Michael Hogan married the appellant, Ellen B. Hogan, who lived with him continuously as his wife from that date until his death in February, 1895. Six children were born of that marriage, one of whom is dead, and five of whom are now living with appellant.

Kate Hogan Wallace is a sister of the said Michael Hogan, deceased. She was married to her husband, James Wallace, in 1878, six years before the issuance of the certificate in question. She has lived with him as his wife from that date to the present time. She has never lived with Michael Hogan since her marriage. She was never dependent upon him. Mr. Wallace has always supported his family, and he is now living.

Kate Wallace styles herself Kate Hogan Wallace, and claims to be the beneficiary intended to be named in the certificate.

It appears that a written application was made by Michael Hogan for the insurance. He signed that application by his mark, and Mrs. Wallace testifies that he could neither read nor write. The application referred to contains a direction that all benefit be paid to "Kate Hogan, related to me as wife, subject to my future disposal of the benefit to my widow, orphans, heirs or devisees, as I may hereafter direct, in compliance with the laws of the order." It also bears the indorsement, "Pay to Katie Hogan, wife."

Dr. James Lawless, a witness for Mrs. Wallace, testified



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that the application is in his handwriting; that he filled it out at Michael Hogan's dictation; that witness then asked him to whom he wished the benefit payable, and he said, "Kate Hogan;" that he asked him if that was his wife's name, and he did not answer, so that the witness "supposed it was his wife," and so described her.

STILLMAN & MARTYN, attorneys for appellant, contended that in construing an insurance policy it should be treated, as far as possible, as a will. Niblack on Ben. Soc. & Ac. Ins., Sec. 179.

The alleged declarations of the deceased were inadmissible. 1 Greenleaf on Evidence, Sec. 290; Stephen's Dig., Art. 91 (6), (7) and (8); Wigram on Wills, prop. VII, page 188; Jarman on Wills, Vol. I (6th Ed.), \*349; Drake v. Drake, 8 H. of L., \*172; Charter v. Charter, L. R., 7 H. L. 364; Richards v. Miller, 62 Ill. 417; Broomfield v. Wilson, 78 Ill. 467; Hiscocks v. Hiscocks, 5 M. & W. \*363; Thayer v. The City of Boston, 1 Paige (Ch.) 290.

The description of the beneficiary as the wife of the insured will prevail over the name. Coke upon Littleton, 3a; Connolly v. Pardon, 1 Paige (Ch.) 290; Adams v. Jones, 21 L. J. 252; Bachmann v. Supreme Lodge, 44 Ill. App. 188; McKinnon v. The People, 110 Ill. 305; Kreitz v. Behrensmeyer, 125 Ill. 141.

FARSON & GREENFIELD, attorneys for appellee.

Latent ambiguities which may be explained by parol fall into two classes: First, where the description of the devisee or subject-matter of devise is clear on the face of the will, but on inquiry it is found that the words describe two or more persons or things with equal accuracy, so unless it can be shown by intrinsic evidence to which the testator intended his words to apply, the devise must fail for uncertainty; and second, where the description of the devise or of the devisee is correct in part and in part incorrect, as where devisee's name is correctly given, but his residence, or some other circumstance descriptive of the

person or thing, is incorrect. *Miller v. Travers*, 8 Bing. 244.

In the case of a latent ambiguity it is certain that explanatory declarations made at the time of execution are admissible. *Harris v. The Bishop of Lincoln*, 2 P. Wms. 137, and *Thomas v. Thomas*, 6 T. R. 671.

See also *Clark v. Powers*, 45 Ill. 284; *Fisher v. Quackenbush*, 83 Ill. 310; *Sharpe v. Thomas*, 100 Ill. 447; *Stevens v. Wait*, 112 Ill. 548; *Bowen v. Allen*, 113 Ill. 59; *Riebling v. Tracy*, 17 Ill. App. 162; *Bradish v. Yocum*, 130 Ill. 392; *Halliday v. Hess*, 147 Ill. 583; *Mason v. Merrill*, 129 Ill. 507.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

A latent ambiguity appearing in the instrument when an attempt was made to identify the beneficiary designated by the deceased, the testimony of Doctor Lawless was admissible to show the circumstances under which the certificate was made, and the words "Pay to Mrs. Kate Hogan, his wife," written therein. *Decker v. Decker*, 121 Ill. 341-350; *Harris v. The Bishop of Lincoln*, 2 P. Wms. 137; *Thomas v. Thomas*, 6 T. R. 671.

The testimony as to what the deceased, after the making of the certificate, said he had intended and promised was improperly received. The question before the court was, to whom did Michael Hogan, when he made application for the certificate, intend it should be made payable; not what he intended or said the next day or year; or what he promised his son or his wife. His intentions, afterward, may have been very different from what they were when he obtained the certificate.

It is highly improbable that Michael Hogan can, when directing that the certificate be made payable to Kate Hogan, have thought that he had directed that it be paid to Mrs. Ellen Hogan, his wife.

Hogan being unable to read or write, the testimony of Dr. Lawless, by whom the certificate was written, shows how the mistake occurred.

From this testimony it appears that Michael Hogan did not mention his wife, or say anything concerning her when the certificate was written; but that, after directing that it be made payable to Kate Hogan, in answer to the question, "Well, is that your wife?" he again said "Kate Hogan," and Doctor Lawless, supposing that was the name of Michael's wife, wrote "Mrs. Kate Hogan, his wife." It also appears that at the time the certificate was made, he was indebted to his sister, Kate Hogan, in the sum of \$1,000.

The reservation in the certificate, "subject to my future disposal of the benefit to my widow, \* \* \* as I may hereafter direct," indicates that Michael Hogan did not then think that he had directed payment to be made to his wife.

From the circumstances surrounding the making of the certificate, we think that the chancellor rightly found that the words "Kate Hogan" correctly described the person to whom it was by Michael intended the insurance should be, and to whom it was, made payable, and the words "his wife" are to be rejected.

Kate Hogan then was a possible heir of her brother, Michael, and the one to whom the certificate was, by his designation, made payable; this is all the charter in this regard required.

The decree of the Superior Court directing the payment of the insurance to Kate Hogan Wallace is affirmed.

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**Maud H. Van Schaack v. Anna E. Leonard, Mary J. Schuyler and Henry T. Byford.**

1. *WILLS—Construction of—Election of Beneficiaries.*—When it appears from a will that it was the intention of the testator to dispose of the property of one who is a beneficiary under another clause of the will, the beneficiary, by accepting the benefit, is barred from claiming what would otherwise be a clear right to his property so disposed of.

**Bill for Relief.**—Appeal from the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 13, 1896.

BULKLEY, GRAY & MORE, attorneys for appellant.

Where a policy of insurance is issued the wife, payable to her, or in case of her death before her husband, to her children, the husband can not, after her death, surrender the policy and take out a new one for his own benefit. 2 May on Insurance, Sec. 392; Chapin v. Fellow, 36 Conn. 132; Fraternal Mutual Life Ins. Co. v. Applegate, 7 O. St. 292; Gould v. Emerson, 99 Mass. 154; Bailey v. New England, etc., Co., 115 Mass. 177; Succession of Kugler, 23 La. An. 455.

The beneficiary takes a vested interest the moment the policy is issued, unless the agreement, by charter or otherwise, contains a provision inconsistent with such a construction. A life policy and the money that may become due on it belongs, the moment it is issued, to the beneficiary named in it, and the person procuring the insurance has no power by deed of assignment or will to surrender the policy, or issue a renewal, or by any other act transfer the interest to any one else. 2 May on Ins., Sec. 399, L; Central Bank of Washington v. Hume, 128 U. S. 195; Pingrey v. Nat. Life Ins. Co., 144 Mass. 374; Weisert v. Muehl, same, 336; Wilmaser v. Continental Life Ins. Co., 66 Ia. 417; Allis v. Ware, 28 Minn. 166; City Savings Bank v. Whittle, 63 N. H. 587; Wilburn v. Wilburn, 83 Ind. 55; Hooker v. Sugg, 102 N. C. 115.

His right can not be affected by any acts of the assured subsequent to the execution of the policy except it be a breach of condition, unless by the charter or otherwise it is part of the original agreement that the beneficiary may be changed, or the beneficiary and the person procuring the insurance enter into an agreement as to what control each shall exercise over the policy. Then the indefeasible interest otherwise vesting in the beneficiary may not arise. If A takes out a policy for his children, the interest vests in them, and if A afterwards surrenders the policy on receiving the cash value of it, he is liable to the children to that amount. 2 May on Insurance, Sec. 399, L; Kline v. National Benefit Ass'n, 111 Ind. 452; Waldrom v. Waldrom, 77 Ala. 285; Supreme Lodge v. Schmidt, 98 Ind. 374.

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In the instance of contracts of insurance with a wife or children, or both, upon their insurable interest in the life of the husband or father, the latter, while they are living, can exercise no power or disposition over the same without their consent; nor has he any interest therein of which he can avail himself; nor upon his death have his personal representatives, or his creditors, any interest in the proceeds of such contracts, which belong to the beneficiary to whom they are payable. It is indeed the general rule that a policy and the money to become due under it belongs, the moment it is issued, to the person or persons named in it as beneficiary or beneficiaries, and that there is no power in the person procuring the insurance, by any act of his, by deed or by will, to transfer to any other person the interest of the person named. *Central Bank of Washington v. Hume*, 128 U. S. 195; *Bliss on Ins.*, 2d Ed. 517; *Glanz v. Gloeckler*, 10 Ill. A. 484; 104 Ill. 573; *Wilburn v. Wilburn*, 83 Ind. 55; *Ricker v. Charter Oak Ins. Co.*, 27 Minn. 193; *Charter Oak Ins. Co. v. Brandt*, 47 Mo. 419; *Gould v. Emerson*, 99 Mass. 154; *Knickerbocker Life Ins. Co. v. Weitz*, 99 Mass. 157; *Kline v. National Benefit Ass'n*, 11 N. E. Rep. 620.

It is undoubtedly a well settled rule of equity that if a person shall take a beneficial interest under a will, he shall be held to thereby confirm and ratify every other part of the will; or, in other words, a man shall not take a beneficial interest under a will and at the same time set up any right which shall defeat or in any way prevent the full effect and operation of every part of the will. *Hyde v. Baldwin*, 17 Pick. 303; *Gorham et al. v. Dodge*, 122 Ill. 535.

If a testator devises an estate belonging to his son to a third person, and in the same will bequeaths an interest to his son, his son must either relinquish his right to his own estate or to the legacy bequeathed to him. *Wilbanks v. Wilbanks*, 18 Ill. 17; *Brown v. Pitney*, 39 Ill. 472; *Wooley v. Schrader*, 116 Ill. 29, 37; *Ditch et al. v. Senate et al.*, 117 Ill. 362, 367.

The intention of the author of the will to dispose of property which is not his, must be manifest; that is, such must clearly appear to be the intention. *Wilbanks v. Wilbanks*, 18 Ill. 17.

The defendants seek to invoke the doctrine of election in this case to defeat the claim of the appellant. This doctrine has no application to a case where the testator had but a part interest in an estate, and such interest only was devised. *Ditch et al. v. Senate et al.*, 117 Ill. 362.

In determining this question, parol evidence is inadmissible to raise an election. *Jarman on Wills*, 6th Ed., s. p. 424. Lord Commissioner Eyre, in *Blake v. Bunbury*, 1 Vesey, Jr., 523, laid it down that "the intention of the testator to dispose of that which was not his, ought to appear on the will."

The admissibility of extrinsic evidence, too, is strongly denied by Lord Loughborough in *Stratton v. Best*, 1 Vesey, Jr., 285. The case of *Cavan v. Pultenay*, 2 Vesey, Jr., 544, and 3 Vesey, Jr., 384, was disapproved by Lord Loughborough in *Rutter v. Maclean*, 4 Vesey, Jr., 537, and by Lord Eldon in *Pole v. Lord Sommers*, 6 Vesey, Jr., 322, and *Druce v. Dennison*, 6 Vesey, Jr., 402.

It must appear on the face of the will that the testator proposes that there should be an election and as to what subjects. *Doe v. Chichester*, 4 Dow. 76, 89, 90. See also *Clementson v. Gandy*, 1 Keen 309; *Dixon v. Sampson*, 2 Y. & C. 566.

Parolevidence is admissible in this class of cases to the same extent as in other cases in aid of the construction of written instruments, and no further. You may show the condition of the subject-matter and the surrounding circumstances so as to place the court in the position of the testator. But his purpose to put the devisee to his election must appear from the will itself. 2 *Redfield on Wills* (3d Ed.), 745; *Fitzhugh v. Hubbard*, 41 Ark. 24; 2 *Redfield on Wills*, 3d Ed. 360, Sec. 16.

The intention as manifested by the will itself to raise a question of election must be clear and decisive; 1 *Jarman on Wills*, 6th Ed., 426; *Drummer v. Pitcher*, 2 M. & K.

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262; 5 Sims, 35; Cavan v. Pultenay, 2 Vesey, Jr., 544; 3 Vesey, Jr., 284; Pole v. Somers, 6 Vesey, Jr., 309; Honywood v. Forster, 30 Beav. 14; In re Gilmore, 81 Calif. 240; Havens v. Sackett, 15 N. Y. 365; Lefevre v. Lefevre, 59 N. Y. 434; Church v. Bull, 2 Denio 430; 5 Hill 206; Fuller v. Yates, 8 Paige 825; Jones v. Jones, 8 Gill 197; Crabb v. Crabb, 1 M. & K. 511; Blommart v. Player, 2 S. & St. 597; Parker v. Carter, 4 Hare 411; Smith v. Lynne, 2 Y. & C. C. 445; Seaman v. Woods, 24 Beav. 381; Atty. Gen. v. Fletcher, 5 L. J. (N. S.), (Ch.) 75; Timewell v. Perkins, 2 Atk. 102.

WM. H. BARNUM, attorney for appellees.

The doctrine of election, which we rely upon as a defense to the claim of appellant's bill, is fairly stated by appellant on the authority of Hyde v. Baldwin, 17 Pick. 303, and Gorham v. Dodge, 122 Ill. 535.

In a more condensed form it is stated in Wilbanks v. Wilbanks, 18 Ill. 19, that parties may not at the same time take under the will and contrary to it, and in Brown v. Pitney, 39 Ill. 472, that the beneficiary under a will must accept the instrument in its entirety or not all.

What gives rise to the duty of election is the circumstances and the law of equitable estoppel. In Wilbanks v. Wilbanks, 18 Ill. 20, the Supreme Court said :

"We think the circumstances clearly present a case for election, and assuming the fact to be as is alleged, that the provisions of the will have been accepted, the plaintiffs are estopped in equity and conscience from all claim to this tract of their own, which is given to the defendant." And again, "If the testator should devise an estate belonging to his son, or heir at law, to a third person, and should in the same will bequeath to his son, or heir at law, a legacy of one hundred thousand dollars, etc., an implied or constructive election is raised. The son or heir must relinquish his own estate or the bequest under the will."

No man can claim any benefit under a will without conforming as far as he is able, and giving effect to everything

contained in it, whereby any disposition is made showing an intention that such a thing shall take place, without reference to the circumstance whether the testator had any knowledge of the extent of his power or not. *Brown v. Pitney*, 39 Ill. 472; *Whistler v. Webster*, 2 Vesey, Jr. 379; *Thelusson v. Woodforde*, 13 Ves. 221.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

In the lifetime of Doctor William H. Byford, now deceased, two life insurance policies upon his life were taken out—one dated July 15, 1857, in the Mutual Benefit Life Insurance Company of Newark, New Jersey, for \$5,000, and the other dated January 16, 1864, in the Equitable Life Assurance Society of the United States for \$10,000.

Said policies were, by their terms, although in different language, payable to Mary Ann Byford, his wife, if living at his death, and if she were not then living, to their children.

The proceeds of these two policies comprise the subject-matter of this litigation, and except when other policies are specifically mentioned, these policies are the ones hereinafter referred to.

The said Mary Ann Byford died March 3, 1864, leaving three daughters, of whom the appellant was one, and two sons, the children of herself and the said Doctor Byford, surviving her.

After the death of his said wife, the said Dr. Byford took out two other policies of insurance upon his life, one dated December 3, 1864, in the said Equitable Life Assurance Society for \$10,000, and the other dated August 26, 1875, in the *Ætna* Life Insurance Company of Hartford, Connecticut, for \$4,000, both of which policies were payable at his death to the appellant, his daughter.

He also took out two other policies upon his life, one dated July 24, 1875, for \$5,000, payable to his second wife, and the other dated July 14, 1884, for \$1,500, payable to his executors.

In the meantime, and on October 14, 1883, William H.



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Byford, junior, one of the said sons, departed this life, leaving a widow, and his father and his one brother and three sisters, the parties hereto, but no child, surviving him.

Finally, and on May 21, 1890, the said Doctor William H. Byford himself died, testate, leaving no child by his second wife, but leaving the appellant and the appellees, children of his first wife, Mary Ann, and his widow, his said second wife, surviving him.

His last will and codicil were duly witnessed, and were as follows:

“Last will and testament of William H. Byford:

I, William H. Byford, of Chicago, Illinois, physician, declare this to be my last will and testament, hereby revoking all former wills by me made.

First. I direct that all my just debts be paid.

Second. I give, devise and bequeath to my wife, Lina W. Byford, my house and grounds on Indiana avenue, in Chicago, now occupied by me as a residence, together with all of the furniture, pictures, plate, linen, china and household goods and utensils therein, and also my barn and its furniture and appliances, together with all of my carriages, horses, harnesses, blankets and robes therein.

Third. I give and bequeath to my son, Dr. Henry T. Byford, all of my medical books and library, my medical and surgical instruments and apparatus, wherever found, and also my office furniture and fixtures.

Fourth. I give, devise and bequeath to my granddaughter, Leolin Leonard, the two southern tenement houses in my new block of buildings erected on lots eighteen and nineteen in block four of Graves' subdivision, and the grounds therewith, being on South Park avenue, in Chicago, between Thirty-second and Thirty-third streets.

Fifth. I give and bequeath to my children, Dr. Henry T. Byford, Mary Jane Schuyler and Anna Byford Leonard, in equal shares, the proceeds derived from all insurance policies upon my life, except from the policies wherein my daughter, Maud H. Byford, is the beneficiary.

Sixth. All the rest and residue of my estate, of every

kind and nature, I give, devise and bequeath to my children, Dr. Henry T. Byford, Mary Jane Schuyler, Anna Byford Leonard and Maud H. Byford, to be divided equally between them, share and share alike.

Seventh. I appoint my wife, Lina W. Byford, executrix, and my son, Dr. Henry T. Byford, executor, of this my will, and direct that no bonds or security be required of them as such executrix or executor.

Witness my hand and seal at Chicago, Illinois, this twentieth day of December, A. D. 1886.

WM. H. BYFORD. [SEAL.]

CODICIL.

I make the following codicil to my last will and testament, dated December 20, 1886, hereby re-affirming all the provisions of said will, except as hereinafter expressed.

I give and devise to my wife, Lina W. Byford, the house and lot known as number thirty-four hundred and twenty-two (3422) Vernon avenue, in Chicago, and to my daughter, Maud H. Byford, the house and lot known as thirty-four hundred twenty-eight (3428) Vernon avenue, in Chicago, with the respective appurtenances.

Witness my hand this thirty-first day of December, in the year of our Lord eighteen hundred eighty-eight.

W. H. BYFORD. [L. S.]”

Wherever in the will and codicil Maud H. Byford is named the appellant is meant, she having subsequently married Mr. Cornelius P. Van Schaack.

The will and codicil were duly admitted to probate, and the persons therein appointed as such were duly qualified as executrix and executor thereof.

Proofs of death under the policies were duly made, the appellant and appellees joining in the making thereof as the beneficiaries under said policies, and the claims were duly allowed by the insurance companies.

The usual form of receipts required in such cases were signed by both appellant and appellees, and bank checks for the amount of the claims as allowed were drawn by the companies to the order of all the parties, by name, and were

indorsed by all of them. The money was collected on the checks by the appellee Henry T. Byford, or by Mr. Schuyler, the husband of appellee Mary J. Schuyler, and was distributed to the appellees in equal parts, excluding appellant from any portion thereof.

Thereafterward the appellant filed her bill for an accounting by appellees of the moneys so received by them, which bill, upon hearing, was dismissed for want of equity, and this appeal is therefrom.

The contention of appellant is, that she was entitled to her proportion of the money collected under said two policies. The appellees on the other hand contend that appellant having elected and in fact taken the provision made for her under the will of her father, may not have both that provision and a share in the insurance money.

It does not seem that there can be much doubt but that Doctor Byford intended by the fifth clause of his will to give to the appellees all the insurance money to be derived from the policies upon his life except such as were made exclusively payable to the appellant by name. Language could scarcely make such intention plainer.

Excluding the policy which was payable to the second wife of Doctor Byford (and such policy is excluded from every inference that might be drawn from anything said in this opinion), there was at the date of his will, and at the date of his death, a total amount of \$30,500 dependent upon his life, of which \$14,000 was payable to the appellant, and was unquestionably what he referred to in his will as being for her benefit.

The record discloses that beyond the insurance policies, and the premises devised to his second wife and to appellant, the estate was a small one, and if a reason were required or admissible, the record affords abundant justification why appellant should have been intended by him to be excluded from participating in the proceeds of the two policies in question. The meaning of the words employed is, however, clear, and does not need interpretation or aid.

It appears that the policies were found in Doctor Byford's

safe after his death, together with all premium receipts from their dates, and that he always paid the premiums.

It would seem from such circumstances, coupled with the fact that he attempted to dispose of the policies, that he claimed to have the right to do so, or at least to put appellant to her election as to which she would have.

Now if intending to dispose of his estate, he included in his gift to others property which already belonged to appellant, and gave to her something else, she is estopped, under the doctrine of election, from claiming both. She must either yield her right to the property already owned by her, or renounce as to that which is given to her. She can not have both.

"The beneficiary under a will can not insist that the provisions in his favor shall be executed and those to his prejudice annulled." *Brown v. Pitney*, 39 Ill. 468.

In the last cited case the opinion was written by Mr. Justice Lawrence, and after saying that the doctrine was founded "upon so clear a principle of natural equity that it must necessarily be recognized in every system of enlightened jurisprudence," he quoted from Lord Alvanley, in *Whistler v. Webster*, 2 Vesey, Jr., 370, that "no man shall claim any benefit under a will without conforming as far as he is able, and giving effect to everything contained in it, whereby any disposition is made showing an intention that such a thing shall take place, without reference to the circumstance whether the testator had any knowledge of the extent of his power or not."

And again, from Lord Erskine, in the case of *Thelusson v. Woodford*, 13 Vesey, 221, that "if a testator, intending to dispose of his property \* \* \* mixes, in his disposition, property that belongs to another person, or property as to which another person has a right to defeat his disposition, giving to that person an interest by his will, that person shall not be permitted to defeat the disposition where it is in his power, and yet take under the will. The reason is, the implied condition that he shall not take both, and the consequence follows that there must be an election; for

though the mistake of the testator can not affect the property of another person, yet that person shall not take the testator's property unless in the manner intended by the testator."

It was held, in *Wilbanks v. Wilbanks*, 18 Ill. 17, that where a testator should devise to a third person an estate which belonged to his (testator's) son, and should by the same will bequeath to his son a moneyed legacy, a case for election arose, and that the son must either relinquish his own estate or the bequest under the will, and that decision was cited approvingly in *Brown v. Pitney*, *supra*.

And again in *Gorham v. Dodge*, 122 Ill. 528, the rule laid down by Chief Justice Shaw in *Hyde v. Baldwin*, 17 Pick. 303, was approved; that whoever takes any beneficial interest under a will shall be held to ratify and confirm every other part of the will; and that no man shall take a beneficial interest under a will, and at the same time set up any right of his own, even if legal and well founded, which shall defeat or in any way prevent the full effect and operation of every part of the will.

The like doctrine is stated in 1 Jarm. on Wills (Bigelow's Ed.), 443, where it is said: "He who accepts a benefit under a deed or will must accept the whole contents of the instrument, conforming to all its provisions, and renouncing every right inconsistent with it. If, therefore, a testator has affected to dispose of property which is not his own, and has given a benefit to the person to whom that property belongs, the devisee or legatee accepting the benefit so given to him must make good the testator's attempted disposition;" and on page 445, the same author says, "it is immaterial in regard to the doctrine of election, whether the testator, in disposing of that which is not his own, is aware of his want of title, or proceeds on the erroneous supposition that he is exercising a power of disposition which belongs to him; in either case, whoever claims in opposition to the will must relinquish what the will gives him."

Where, therefore, it appears from the will that it was the

intention of the testator to dispose of the property of one who is a beneficiary under another clause of the will, the beneficiary by accepting the benefit is barred from claiming what would, otherwise, be a clear right to his or her property so disposed of.

That it was the manifest intention of Doctor Byford by his will to dispose of the two policies in question in which the appellant had a vested property right, can hardly admit of question, if the fair meaning of the words he employed shall be accorded to them. He did not speak of them possessively as his own, but as "all insurance policies upon my life." But it is not necessary to prolong this opinion, although numerous other propositions are argued with pertinacity and force.

The intention of the testator, expressed by his will, seems to be plain, and it is conceded that the appellant accepted the other provisions of the will which are beneficial to her, and it is not denied that such beneficial provisions were of greater value than appellant's interest in the two policies in question.

The judgment of the Circuit Court is affirmed.

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### B. A. L. Thompson v. John Jana.

1. VERDICT—*On Conflicting Evidence*.—A verdict upon conflicting evidence is conclusive.

**Replevin.**—Appeal from the County Court of Cook County; the Hon. ORRIN H. CARTER, Judge, presiding. Heard in this court at March term, 1896. Affirmed. Opinion filed April 13, 1896.

#### STATEMENT OF THE CASE.

An action of replevin was brought by Thompson against Jana, before a justice of the peace, October 27, 1893, for a horse. The return of the officer shows that the property was not taken on the replevin writ. Plaintiff then declared in trover, and judgment in trover for \$125 and costs was

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rendered by the justice; the defendant appealed to the County Court.

A trial was had in the County Court, and a verdict of guilty rendered, the plaintiff's damages being assessed at \$136.43. On motion of the defendant a new trial was granted. A second trial was had in the County Court, resulting in a verdict of not guilty. A motion for a new trial was overruled, and judgment was entered on that verdict for the defendant. This appeal is prosecuted by the plaintiff.

FREDERICK W. PACKARD, attorney for appellant.

J. F. KOHOUT, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Under the contradictory evidence in this case the jury might have, by inference, found that the carriage horse "Gray Ben," "about seven years old, weight 1,150 pounds," mortgaged by Emmet C. Gibson, was the horse delivered by the horse-shoer, Connelly, to the defendant Jana; but as the jury did not so find, we are unable, upon this record, to reverse the conclusion of the court below, that the plaintiff did not make out his claim to the right of possession of the horse in the custody of the defendant.

There was only evidence by inference as to the identity of the animal.

The judgment of the County Court is affirmed.

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John C. Harper v. Charles Scott.

1. TROVER—*Certainty of Description—Proof.*—Where the action is for the conversion of the sum of \$428.06, of the value of \$428.06, it is not error to instruct the jury that if they believe from the evidence that the money so converted did not amount to, but was less than the sum of \$428.06, as charged, then they should find the defendant not guilty.

2. *SAME—Conversion of Money.*—Where the action is for the conversion of money, if the money be described as a specific lump sum of a certain value, the precise amount must be proved to have been converted; for the sum named is the only descriptive feature of the money.

**Trover**, for so much money converted. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 13, 1896.

EDWARD J. QUEENY, attorney for appellant.

RICH & STONE and RANDALL W. BURNS, attorneys for appellee, contended that where the plaintiff declares in trover, as in the case at bar, for the specific sum of 428.06 in money, such amount is not divisible, and plaintiff must prove conversion of the whole of that sum or fail to recover, on account of variance.

The general rule of law is clear, that to support trover the plaintiff must have the right to some identical or specific goods. 1 Chitty on Pleadings 147, Par. 148.

Trover does not lie for money had and received generally. The money alleged to have been converted must be specifically set forth as so many bank bills, treasury notes, so much coin, or so many pieces of gold or silver. 1 Chitty on Pleadings 147, Par. 148; Wells on Replevin, page 41, Ch. 3, Sec. 59; Dows v. Bignam, 29 Cal. 619.

Even if the instructions complained of were erroneous, it would not have injured the plaintiff and would not therefore be reversible error, for in any case had the court not given the instructions complained of and had a verdict and judgment thereon been obtained for the plaintiff, the court would have been obliged to arrest such judgment because of the indefiniteness of the second count in plaintiff's declaration. McElhan v. Farmers' Alliance Warehouse Co., 22 S. E. Rep. 686.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was an action of trover, and resulted in a verdict in



favor of the defendant (appellee here), upon which a judgment for costs was entered against the appellant, who was the plaintiff below.

The declaration consisted of two counts, the first one of which alleged the conversion by appellee to his own use of certain groceries, etc., of the value of \$428.06; and the second, the conversion by appellee of the sum of \$428.06 in money, of the value of \$428.06.

The proof failed to sustain the allegations of the first count of the declaration, and the court properly instructed the jury to find the defendant (appellee) not guilty as to that count; and for such instruction we do not find that appellant makes any objection in his brief.

Complaint, however, is made of three instructions given with reference to the second count, as follows:

“I. The court instructs the jury that if they believe from the evidence that the defendant Scott did receive and convert to his own use money belonging to the plaintiff, still if they believe from the evidence that the money so converted did not amount to, but was less than the sum of \$428.06, as charged in the second count of the plaintiff's declaration, then they should find the defendant not guilty, on the said second count.”

“III. The court instructs the jury that unless they believe from the evidence that the defendant received the sum of \$428.06, as charged in the second count of the plaintiff's declaration, they should find the defendant not guilty as to that count.”

“VIII. The jury are instructed that if they believe from the evidence and under these instructions that the defendant is not guilty of wrongfully converting to his own use money of the plaintiff in this cause, to the value of \$428.06, they should find their verdict in the following form: ‘We, the jury, find the defendant not guilty.’”

Such instructions substantially state the law as applicable to the second count.

The allegation of that count is of the conversion of certain “goods and chattels, to-wit: the sum of four hundred

twenty-eight dollars and six cents in money of the value of four hundred twenty-eight and 06.100 dollars."

The declaration was therefore for a certain sum, and not for a number of dollars. Omitting to discuss whether a count in trover be good which alleges that a specific sum of money was converted, and does not set forth the money as so many dollars, bank bills, treasury notes or pieces of coin, of a particular value, with the particularity required in replevin, where restitution of the thing itself is sought, it seems quite certain that if the money be described as a specific lump sum of a certain value, the precise amount must be proved to have been converted, for the sum named is the only descriptive feature of the money.

It was held in *Clement v. Brown*, 30 Ill. 43, that the judgment in trover must be reversed where, in the judgment, was included the value of items which could not be recovered for in that form of action.

The action, it is said, will not lie for money had and received, "but it may be maintained for so many pieces of gold or silver, though not in a bag." 1 Chitty Pl. (16th Am. Ed.), 213 (star page 166).

The action of trover is one form of trespass on the case, and in *Holmes v. Hodgson*, 8 Moore 379 (17 Eng. Com. Law, 543), the declaration in trespass for breaking the close and taking chattels, which described the goods as "one hundred articles of household furniture and one hundred articles of wearing apparel," without describing their nature or quality, was held to be subject to a general demurrer.

It was held in *McElhannon v. Farmers Alliance Warehouse Co.*, 95 Ga. 670, that a declaration in trover brought for the recovery of money described as "three thousand five hundred dollars lawful money of the United States," was too vague and indefinite in its description of the property.

True, that action was brought under the provisions of the Georgia code, which required a description of the property, but the reasoning of the court seems to be applicable to cases generally in trover.

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We think there was no substantial error in the instructions complained of.

On the merits, also, we think the judgment was correct. The evidence tended strongly to show, and the jury had the right to conclude, under other instructions that were given, that the appellee was the purchaser of the goods delivered to him by appellant, and was not his agent to sell the same.

If the appellant has any right of action against the appellee, it would seem to be not in trover for the sum of money alleged in the declaration.

The judgment is affirmed.

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**Thomas B. Baker et al., for use of Daniel R. Brant, v.  
George G. Newbury.**

63	405
70	310
63	405
106	601

1. BILL OF EXCEPTIONS—*Should Show What Was Excepted to.*—When a bill of exceptions states “exception” or “exception by plaintiffs,” etc., without particularizing what is excepted to, the court will not undertake to supply the omission.

**Action for Deceit.**—Error to the Superior Court of Cook County; the Hon. GEORGE F. BLANKE, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 18, 1896.

C. M. HARDY, attorney for plaintiffs in error.

JESSE HOLDOM, attorney for defendant in error.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was an action in case for deceit, brought by plaintiffs in error to charge the defendant in error upon a certain indorsement made by him upon a certain paper in writing signed by numerous other persons, whereby they severally agreed to pay specific sums of money on account of anticipated benefits arising to their respective properties by reason of the erection of a theatre building on Wabash avenue between 18th and 20th streets, in Chicago.

The indorsement made by appellee was as follows :

"Mr. Fuller is willing to give \$750 when building is completed, and instructs Geo. G. Newbury to pay it for him."

The declaration alleged that the appellee falsely pretended to have authority from one William A. Fuller to make said indorsement, or subscription, and that relying upon his supposed authority, the appellants went on and erected, and fully completed, the theatre contemplated, at great expense, whereas in fact appellee's pretenses in that regard were false, etc., whereby they were damaged, etc.

The cause coming on for trial, the court at the conclusion of plaintiffs' evidence, instructed the jury to find for the defendant, and judgment being accordingly entered against the plaintiffs for costs, this writ of error is prosecuted.

The assigned errors are because of the rejection of evidence offered by plaintiffs; "in permitting improper questions to be put to and answered by Daniel R. Brant (plaintiffs' witness) on examination;" in orally instructing the jury to find for the defendant; in taking the case from the jury by a peremptory instruction, and in rendering the judgment for costs.

The evidence that was rejected, and to the rejection of which any exception was attempted to be taken by the plaintiffs, was directed toward establishing that the subscriptions of which that in question was one, and the representations made by the appellee, were the moving cause and inducement for the building of the theatre, and that without such subscriptions and statements the theatre would not and could not have been built. It was proved that all the other subscriptions were paid, but upon what representation or inducements any of them were given, or were afterward paid, the trial court ruled adversely to the plaintiff.

Whether the trial court ruled correctly in that regard, can not be questioned upon the record here.

The rule that the appellant must be held responsible for all uncertainties and omissions in his bill of exceptions, has long prevailed in this State, and between *Rogers v. Hall*, 3 Scam. 5, decided in 1841, and *Arcade Co. v. Allen*, 51 Ill.

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Orcutt v. Williams.

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App. 305, decided in 1893, has been frequently given expression. When, therefore, a bill of exceptions states "exception," "exception by plaintiff," etc., without particularizing what is excepted to, we can not undertake to supply the omission. And this applies with equal force to the admission of improper evidence on the cross-examination of the witness Brant.

Under the evidence that was heard, and without a consideration of errors which, for lack of proper exceptions can not be inquired into, we think the court properly took the case from the jury by the instruction to find for the defendant.

The remaining error that is assigned, because of the jury being orally instructed to find for the defendant, has no foundation of fact to stand upon, the matter upon which it is based having been, upon motion of appellee, expunged from the record.

The judgment of the Superior Court is affirmed.

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**William F. Orcutt v. Ella Williams.**

1. **WAIVER—Of Strict Rights Under Chattel Mortgage.**—Where the mortgagee agrees that the mortgagor may have an extension of the indebtedness, and make payments thereon to suit his convenience, and payments are so made and accepted subsequent to the maturity of the indebtedness, such facts amount to a waiver of the strict rights of the mortgagee to claim the property, either because of a default in the mortgage or otherwise.

2. **CHATTEL MORTGAGE—Sales Under.**—Under a power of sale in a chattel mortgage authorizing the mortgagee, in case of default, to sell the property at public or private sale, the mortgagee can not sell the mortgaged property with a large quantity of other property in bulk for a lump sum.

**Replevin.**—Appeal from the Circuit Court, Cook County; the Hon. CHARLES G. NEELEY, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 13, 1896.

KNIGHT & BROWN and WILLIAM G. ADAMS, attorneys for appellant.

P. O'NEIL BYRNE, attorney for appellee.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellee sued out a writ of replevin before a justice of the peace to recover a certain piano to which she claimed ownership and the right of possession, and which, as she complained, was in the possession of and wrongfully withheld by the appellant.

The return of the writ showed a demand upon appellant and his refusal to deliver the property.

Upon an appeal by appellant to the Circuit Court, this judgment for \$200 damages was recovered against him.

The appellee, being the owner and in possession of the piano, on March 5, 1891, borrowed of a Mrs. Thompson a sum of money, and to secure the loan gave her promissory note for \$80, payable to the order of one Cain, a clerk for Mrs. Thompson, on the fifth of June following, and to secure said note executed a chattel mortgage upon the piano. Two days later the appellee moved her residence, and having no convenient place to keep the piano, she, with the consent of Mrs. Thompson, placed it for storage in a hotel then kept and occupied by Mrs. Thompson, and it was put into one of the rooms of the hotel. Subsequently, and while the piano remained in the hotel, Mrs. Thompson, by bill of sale, dated July 13, 1891, sold her lease of said hotel, together with all the furniture and fixtures therein, to the appellant, who took possession on August 1, 1891, by virtue of such sale to him, and from thenceforward claimed the piano as his own, although his claim to the piano was not known to the appellee until after she had paid to Mrs. Thompson all of said indebtedness.

It will be observed that the note secured by the chattel mortgage matured, allowing for days of grace, on June 8, 1891.

The note itself bore an indorsement of \$23, as paid thereon on June 9, 1891, and various receipts introduced in evidence showed other payments to have been made by the appellee,

on August 21, 1891, of \$17, September 7, 1891, of \$30, and finally full payment on October 5, 1891, and it was when the last payment was made that appellee asked for the piano to be delivered back to her. There was also evidence that Mrs. Thompson agreed that appellee might have an extension of her note, and make payments thereon to suit her convenience, and that the payments were made in pursuance of that agreement; and we think that such agreement, taken in connection with the acceptance of the payments subsequent to the maturity of the indebtedness, amounted to a waiver of the strict rights of the mortgagee to claim the piano, either because of default in the mortgage, or otherwise. Indeed, it is quite clear that Mrs. Thompson never claimed to have or keep possession of the piano adversely to the appellee, but always recognized her right to it, subject only to the payment of the debt.

And there was evidence that after appellant bought the hotel, his partner in the business of running it, gave express permission to the appellee to continue leaving the piano there so long as it was not in the way, and told her he would send her word if they wanted her to remove it.

Furthermore, though nothing had occurred between the mortgagee and the appellee to change the strict rights of the mortgagee after default under the mortgage, we do not think the mortgagee had the power under the terms of the mortgage to sell the piano, as was done, with all the other furniture of the hotel, in bulk for a lump sum.

The power contained in the mortgage, was in case of default to sell the piano "at public or private sale, and after satisfying the amount due and all expenses, the surplus, if any remain, shall be paid over to said mortgagor."

No sale in conformity with such power was ever attempted to be made by the mortgagee. The bill of sale to appellant, and under which he claims the piano, was for the lump sum of \$3,900, and included all of the "furniture, fixtures, lease," etc. There is nothing to indicate a separate sale of, or fixed price for, the piano by itself, and therefore whatever the value of the piano, there could be no ascertained surplus upon such a sale.

We do not think the appellant can claim title to the piano under a sale so made by the mortgagee.

If there were lacking in the evidence in behalf of appellee a sufficient demand upon appellant to found trover upon, we think it was supplied by appellant's testimony that appellee called upon him and claimed the piano.

Upon the whole record, the judgment must be affirmed.

63	410
f115	812

### Frederick Ziegler v. The Pennsylvania Company.

1. INSTRUCTIONS—*To Find for the Defendant.*—Where the testimony raises a question of fact, it is error to instruct the jury to find for the defendant.

Trespass on the Case, for personal injuries. Error to the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1896. Reversed and remanded. Opinion filed April 18, 1896.

CASE & HOGAN, attorneys for plaintiff in error; D. D. O'BRIEN, of counsel.

GEO. WILLARD, attorney for defendant in error.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The plaintiff sued for personal injury. No evidence was offered by the defendant as to the circumstances under which the injury was received, and no comment upon them is necessary.

The defense relied upon was a release by the plaintiff. The testimony raises a question of fact, which should have been left to the jury, whether that release was binding upon the plaintiff. It is better that we do not comment upon that testimony. If what we might say upon it would be of advantage to either party upon another trial, that party is not entitled to such advantage. No return of the money



Pease v. Smith.

paid by the defendant to the plaintiff was necessary to entitle the plaintiff to dispute the release, if in fact it was not his deed. *Star Accident Co. v. Sibley*, 57 Ill. App. 315. In such case it "is, in law, as though it had never been executed." *Chi., R. I. & P. Ry. v. Lewis*, 109 Ill. 120.

It was error to instruct the jury to find for the defendant. The judgment is reversed and the cause remanded.

### James Pease, Sheriff, v. George H. Smith, Receiver.

1. **PRIORITY OF LIENS—*Sheriff and Receiver.***—The levy of an execution or attachment by a sheriff, and the taking into possession by him of property of the defendant before the appointment of a receiver, not only gives the plaintiff in such writ a prior right to the proceeds, but gives to the sheriff the prior right to the possession of such property as against the receiver.

**Bill for Relief and Injunction.**—Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the March term, 1896. Reversed and remanded with directions. Opinion filed April 13, 1896.

EDWARD S. ELLIOTT, attorney for appellant; DEFREES, BRACE & RITTER, of counsel.

A. E. GAMMAGE and EDWIN W. SIMMS, attorneys for appellee; WILLARD GENTLEMAN, of counsel.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The facts of this case sufficiently appear by what is copied from the abstract thus :

"Order (from which appeal in this case is taken) entered March 14, 1896, recites that cause came on to be heard upon the motion of George H. Smith, receiver, for an order on James Pease, sheriff of Cook county, to surrender certain property of the Illinois Enameling Company to the receiver; that said sheriff has had notice of such motion, and is in court resisting the same. The court finds that before the

appointment of a receiver, a certain writ of execution at the suit of the Whiting Foundry Equipment Company against the Illinois Enameling Company came into the hands of said sheriff and was levied upon the real and personal property of the said corporation before the appointment of a receiver in this case. Also that sundry writs of attachment came into the hands of said sheriff before the appointment of a receiver and were levied on the real and personal property of said company; that the sheriff had levied said writs, and was holding said property by virtue thereof, when the receiver was appointed and claimed to hold same by virtue thereof.

It is thereupon adjudged, ordered and decreed that said James Pease, sheriff, turn over and surrender possession of said property to the receiver in this case, and the receiver accept and hold the same, subject to the lien, if any, of the executions and several attachments so levied by the sheriff prior to his appointment; that the lien, if any, of said executions and attachments be protected and preserved; that the receiver sell the property and hold the proceeds subject to such lien, if any, and that all question as to the validity of such liens, and amounts due thereon, is reserved for the further order of the court. That said sheriff is, until the further order of the court, enjoined and prohibited from selling the property under said writs of execution and attachment, and from proceeding further in the execution of said writs against said property."

The order is wrong.

The levies not only gave the plaintiff in the executions, and the plaintiffs in the attachments, if they maintained them, a prior right to the proceeds of the property, but they gave to the sheriff the prior right to the possession of the personal property levied upon. Enough cases are cited in *High on Receivers*, Sec. 440, to establish that proposition.

The order is reversed and the cause remanded, with directions to dissolve the injunction against the appellant, and vacate the order directing him to surrender possession to the appellee. Reversed and remanded with directions.

**American Publishing House v. B. H. Wilson.**

68	413
97	641

1. **PERFORMANCE OF ENTIRE CONTRACTS.**—An agreement to serve another for twelve months is an entire contract, and a substantial performance of it must be shown before a recovery can be had upon it.

**Assumpsit for Services.**—Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the March term, 1896. Reversed and remanded. Opinion filed March 31, 1896.

JOHN H. KANE, attorney for appellant.

Where a contract is reduced to writing, the writing merges all prior and contemporaneous agreements in respect to the subject-matter. *Lane v. Sharpe*, 3 Scam. 566; *Stookey v. Hughes*, 18 Ill. 55; *Robinson v. Magarity*, 28 Ill. 423; *Snyder v. Griswold*, 37 Ill. 216; *Fitch v. Priest*, 46 Ill. 441; *Ely v. Ely*, 80 Ill. 532; *Bragg v. Geddes*, 93 Ill. 39.

Where the parties reduce their contract to writing their intention must be gathered from its terms; the writing must speak for itself. *Kimball v. Custer*, 73 Ill. 389; *Gardt v. Brown*, 113 Ill. 475.

The intent to be enforced is that which is to be ascertained by a proper construction of the words employed. *Adams & Westlake Mfg. Co. v. Cook*, 16 Ill. App. 161.

Where the parties undertake to put their engagements in writing, it will be presumed that the writing expresses the whole contract. *Farras v. Hinch*, 20 Ill. 646; *Merchant's Insurance Co. v. Morrison*, 62 Ill. 242; *Harding v. Commercial Loan Co.*, 84 Ill. 251; *Wright v. Sampter*, 127 Ill. 167.

Where the language is unequivocal there is no room for construction, and the contract must be enforced according to its legal effect, although the parties have failed to express their real intention. *Benjamin v. McConnell*, 4 Gilm. 536; *Walker v. Tucker*, 70 Ill. 527; *Canterberry v. Miller*, 76 Ill. 355.

While a contract is to be construed as to give effect to the intention of the parties, they are presumed to intend what their language imports. *Williams v. Fletcher*, 129 Ill. 356.

Where a contract is avoided it **must** be avoided *in toto*. A party can not retain of **an entire** contract that part which is valuable to him and avoid it as to the residue. Covington v. Short, 77 Ill. 587; Buchanan v. Horney, 12 Ill. 336; Ryan v. Brant, 42 Ill. 78; Kimball v. Lincoln, 7 Ill. App. 470.

An entire contract can not be affirmed so far as it has been performed and avoided as to the residue. Eldridge v. Rowe, 2 Gilm. 91.

Where one undertakes to do a certain thing for a certain sum he is not entitled to compensation if he fails to perform, for what he does in trying to perform; the contract is entire. Illingsworth v. Slosson, 19 Ill. App. 612; Laughlin v. Ettinger, 14 Ill. App. 335.

The instructions of the court for the plaintiff below proceeded upon the theory that the sickness complained of by the plaintiff was occasioned by an "act of God," and released the plaintiff from completing her contract. This idea is erroneous; the law recognizes a distinction between that class of cases where the obligation is imposed by operation of law, and the class where the obligation is created by the express agreement, or covenant of the party himself. In the former the phrase "act of God" has been applied to a variety of unavoidable accidents, which has been held to discharge the legal liability; in the latter class, the only contingency to which that phrase has been applied, as excusing performance, has been the death of the party who alone in his own proper person could perform the thing to be done, or the destruction of the very thing which, identically, was to be delivered, sold or transferred, and which it was physically impossible always for human power to cause to exist. 2 Co. Lit. 206; 3 Co. Lit., Note 1 to 206 a; Williams v. Lloyd, Wm. Jones 179; 2 Pars. Cont. 184; Chit. Cont., 5th Am. Ed., 57, 59, 735; Walton v. Waterhouse, 2 Saund. 420.

The "act of God" will excuse the non-performance of a duty created by law, but not of one created by contract. School District No. 1 v. Dauchy, 25 Conn. 530.

Where a law casts a duty on a party, the performance

shall be excused if it be rendered impossible by the "act of God;" but where the party, by his own contract, engages to do an act, it is deemed to be his own fault and folly that he did not thereby provide against contingencies. Chitty on Contracts, 272.

SAMUEL S. PARKS, attorney for appellee, contended that where a person is employed to perform a personal service, which can not be performed by proxy, illness will excuse him. *Spalding et al. v. Rosa et al.*, 71 N. Y. 40.

Contracts for personal services, whether of the contracting party or of a third party, requiring skill, and which can only be performed by the particular individual named, are not of absolute obligation under all circumstances. Both parties must be supposed to contemplate the continuance of the ability of the person whose skilled services are the subject of the contract, as one of the conditions of the contract. Such contracts are subject to this implied condition, that the person shall be able at the time appointed to perform them; and if he dies, or without fault on the part of the covenantor becomes disabled, the obligation to perform is extinguished. *People v. Manning*, 8 Cow. 297; *Jones v. Judd*, 4 N. Y. 411; *Clark v. Gilbert*, 26 N. Y. 279; *Wolfe v. Howes*, 24 Barb. 174; *Gray v. Murray*, 3 J. C. R. 167; *Robinson v. Davison*, L. R., 6 Excheq. 268; *Boast v. Frith*, L. R., 4 Com. Pleas, I.

"So also where the contract is for personal services, which none but the person contracting can perform, inevitable accident, or the act of God, will excuse non-performance. But when the thing or work to be performed may be done by another person, then all accidents are at the risk of the promisor." *Wheeler v. Conn. Mut. Life Ins. Co.*, 82 N. Y. 550.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellee entered into a written contract with the appellant, dated September 21, 1894, whereby she agreed to "enter the services of the said American Publishing House

for a period of twelve (12) months as traveling agent, to select and appoint suitable agents for the sale of the books and publications of the said American Publishing House," and to faithfully devote her time and attention exclusively thereto, and to travel whenever required, etc.

She entered upon the service, and continued therein until December 20th of that year, and thereupon sued and recovered for three months salary, and a balance on account of commissions, etc., aggregating in all \$199. This appeal is from the judgment entered in her favor.

The written contract was offered in evidence, and shows on its face that the term of employment therein stated was first written "twelve" months by typewriter, and then "twelve" erased and "three" written by pen above the "twelve," and afterwards the "three" erased and "twelve" substituted by pen, so that at last it remained as expressing a term of twelve months.

Whether such changes were made before or after signing, and upon any, and if so, what, verbal agreement contemporaneous therewith, or subsequent thereto, was a subject of controversy and of conflict in the evidence.

The appellee testified, in substance, that as first prepared and signed, the writing expressed twelve months, but that on the following morning the "twelve" was erased and "three" put in its place in order to meet her wish to take employment for three months only, on account of the uncertainty of her health, but that upon her promise to continue for twelve months if she could, the "three" was erased, and "twelve" substituted, upon the verbal agreement that if her health failed she should be released at the end of three months.

On the part of appellant the evidence tended to establish that all the changes were made before signing, and that there was no verbal agreement concerning a release of appellee at the end of three months.

For precisely what reason the appellee ceased her employment on December 20th, does not quite satisfactorily appear.

She testified that it was because of her health not per-

mitting her to continue, without a rest, in work that required her to do so much walking, and that her incapacity in one of her knees was such that it was nearly two months after she quit before she could again get around satisfactorily.

On the other hand, she wrote appellant, under date of December 19, 1894, a letter, from which the following is an extract:

"I must be in Chicago, December 21st. It will not be at all necessary for you to make out a route for me after New Years, for nothing on earth would induce me to go out again while the country is in its present condition and money so scarce. Agents can not sell books, and even with your offer, which is considered liberal, they can not afford to work all winter and perhaps get nothing until their contract expires; you wouldn't do it yourself."

If appellee's testimony be accepted as the true version, both as regards the alterations in the written agreement and the verbal agreement in connection therewith, and that her imperfect health disabled her from a continuance in the employment beyond the period of three months, a question not discussed in the briefs is raised as to the legal effect of adopting, or consenting to, changes in a written contract after it has been executed, and whether the writing so changed is not the exclusive evidence, not to be contradicted by parol, of what the contract between the parties is.

That question need not be decided or discussed, for it is objected that the second instruction given for the appellee was erroneous. It was as follows:

"2. The court instructs the jury that if the contract between the plaintiff and the American Publishing House does not provide for a forfeiture of the plaintiff's salary as damages in case plaintiff should not work for the entire time stated in the contract, the plaintiff would be entitled to recover for the time she actually did work, if she did not work the entire time."

It is almost too plain for argument that such instruction does not correctly state the rule of law.

More than fifty years ago the rule was laid down in this State, in conformity with much older precedent, in the following words:

"When the agreement is entire, a full and substantial performance of a condition precedent by the plaintiff must be shown before he can recover on the contract; for an entire contract can not be affirmed as far as it has been performed and rescinded as to the residue." *Eldridge v. Rowe*, 2 Gil. 91; see also *Cutler v. Powell*, 6 Durn. & East. (Term Rep.) 320.

And the rule so announced has never been departed from.

This court said in *Illingsworth v. Slosson*, 19 Ill. App. 612:

"The contract is entire. What was to be done by one party and what was to be paid by the other, is certain and fixed. In such case there can be no apportionment, and no recovery for any part of the consideration, until that for which it is agreed to be paid has been performed."

It is plain from an inspection of the whole contract, that it contains no express provision for a forfeiture of the plaintiff's salary in any event, and to instruct the jury in the language that was used, was in effect to tell them the appellee was entitled to recover, as a matter of law, for the time she worked, irrespective of the terms of the contract.

This was clear error, as is shown by the authorities cited, and for that the judgment must be reversed and the cause remanded.

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**Albert J. Stone v. Albert S. Tyler and Louis A. Hippach,  
Copartners as Tyler & Hippach.**

1. **MECHANIC'S LIENS**.—*To What They May Attach*.—A mechanic's lien may attach to the proceeds of property to which the lien had attached, after the property is no longer accessible.

**Petition for a Mechanic's Lien**.—Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 13, 1896.



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Stone v. Tyler.

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FRANK J. CRAWFORD and C. D. SMITH, attorneys for appellant, contended that the court had equitable powers sufficiently broad to reach all the equities and to adjust all the rights and liabilities of the various parties, and it should have settled, disposed of and enforced the rights of the lien claimants in that suit. *Boone et al. v. Clark et al.*, 129 Ill. 493.

The right of a lien claimant to have a receiver in his suit to enforce his lien can be no greater than those of a mortgagee to have a receiver in his suit to foreclose his mortgage. Statute on Liens (Act of 1895), Sec. 12.

A sale of the property upon which both the mechanic and mortgagee claim a lien ends the lien of both upon the property. If the sale is under a decree in the mechanic's lien suit, it puts an end to the lien of the mortgage. If the sale is under a decree in the mortgage foreclosure suit, it puts an end to the mechanic's lien. *Topping v. Brown*, 63 Ill. 348; *Davis v. Conn. Mut. Life Ins. Co.*, 84 Ill. 508.

By a sale of the property, whether the same be made in the mechanic's lien suit or in a mortgage foreclosure suit, the parties to the suit are remitted to the fund resulting from the sale. *Topping v. Brown*, 63 Ill. 348.

The proceeds of the sale represent and stand in place of the land and building, and the parties (the mortgagee and the lien claimant) have the same proportionate interest in the proceeds that they had in the property before it was sold. *Bradley v. Simpson*, 93 Ill. 93.

An independent action will not lie by a junior incumbrancer to reach the surplus under a foreclosure by a senior mortgagee. He must come into the foreclosure proceedings. *Fleiss v. Buckley*, Adm'r, 90 N. Y. 286.

There can be no decree giving the mechanic a lien upon property which can not be sold to satisfy the decree. *Boughton v. MacDonough Co.*, 84 Ill. 396.

The court has no authority to enter a personal decree when no lien can be declared against the property. *Boughton v. MacDonough Co.*, 84 Ill. 384; *Sprague v. Green*, 18 Ill. App. 476.

EDWARD J. WALSH, attorney for appellees.

The appointment of a receiver is a remedy. It is part of the procedure of courts of chancery to conserve and enforce equitable rights, although not an equity itself. 20 Am. & Eng. Enc. of L., 17; Bispham's Eq. Jur., Sec. 36; Hottenstein v. Conrad, 9 Kas. 438.

No matter when the rights of the parties accrued, the remedy in force up to the time of the entry of decree, is the remedy to be pursued. Templeton v. Horne, 82 Ill. 491; Turney v. Saunders, 4 Scam. 527; Barton v. Steinmitz, 37 Ill. App. 141; Hughes v. Russell, 43 Ill. App. 430.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

September 22, 1892, the appellees filed against the appellant a petition for a mechanic's lien, and the suit being still pending, December 12, 1895, they filed a petition for the appointment of a receiver over the premises upon which the lien was claimed. The court appointed the receiver, and this appeal is from the order making such appointment.

The appellees cite Sec. 12 of the "Act to Revise the Law in Relation to Mechanic's Liens," approved June 25, 1895, as authority that the court may appoint a receiver in a mechanic's lien suit, and appellant, in terms, declines to discuss the question whether that act applies to this suit; so that what is now decided is not to be regarded as expressive of any opinion upon that question. The record very clearly shows that there is very little probability—it may well be stated more strongly—that the appellees will ever obtain any part of the money due to them, which originally was \$2,672.73 undisputed, besides \$174.17 disputed, and which the report of the master—not excepted to—fixes at \$3,330.49 due November 30, 1895, unless through a receiver of the rents of the premises while the time of redemption from a sale under a mortgage is running. That mortgage, by consent of both the parties here, had precedence of the lien of the appellees. The sale was December 4, 1895, for \$90,776.27 to the mortgagee, which sum was only enough to pay the mortgage decree, costs and expenses.

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Talcott v. Peterson.

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The cases, *Gatz v. Casey*, 15 Ill. 189, *Ellet v. Tyler*, 41 Ill. 449, and *Elgin Lumber Co. v. Langman*, 23 Ill. App. 250, are authority that a mechanic's lien may attach to the proceeds of property to which the lien had attached, after the property itself is no longer accessible. Whether it has become inaccessible by the fault or misfortune of the party by contract with whom the lien accrued, and who controls the proceeds, can make no difference in the equity of the holder of the lien. The rents of the premises during the time of redemption belong to the appellant. Under contract with him the lien accrued. The rents proceed from the premises to which the lien attached.

Why should they not be applied to discharge the lien? That is a question not to be answered on this appeal from an interlocutory order, but will remain to be decided when the final decree is entered, without any inference from this opinion. It is objected by the appellant that the appellees have delayed in the prosecution of their suit, and that such delay should prevent their relief through a receiver.

On the record that is here, it is impossible to tell who is at fault for the delay, but it is certain that the appellees are not to be blamed that the appellant has not paid them. This opinion is not to be taken as holding that we have enough record here, to reverse any order upon. *Pease v. Francis*, 63 Ill. App. 338.

The order is affirmed.

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### Harvey H. Talcott v. Salve Peterson.

1. **EQUITABLE ASSIGNMENT—*What is.***—The court states a transaction between parties and holds it to be an equitable assignment.

2. **RENTS—*Accruing During the Statutory Period of Redemption.***—Where a decree of foreclosure has been fully satisfied by a sale of the mortgaged premises and without any application of the rents (possession of the premises having been turned over to avoid the appointment of a receiver), all the rents received from the premises prior to the expiration of the period for redemption belong to the mortgagor, and he may have his action therefor in assumpsit as for money had and received, and his creditors may reach the same by a creditor's bill.

**Creditor's Bill.**—Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 13, 1896.

HARVEY H. TALCOTT, *pro se*.

The courts of Illinois adhere to the doctrine of the common law. They regard the mortgage deed as passing at once the legal title to the mortgage, subject to defeasance as a condition subsequent, which divests or defeats the estate on performance of it. The right of possession follows the title, so that the mortgagee may enter into possession of the mortgaged property immediately, unless restrained by express provisions or necessary implications of the mortgage, and in any case, upon the breach of the condition, he becomes entitled to possess it and may recover it by action. *Carroll v. Ballance*, 26 Ill. 9; *Vansant v. Allmon*, 23 Ill. 33; *Delahay v. Clement*, 3 Scam. 202; *Nelson v. Pinegar*, 30 Ill. 473; *Jackson v. Warren*, 32 Ill. 331; *Pollock v. Maison*, 41 Ill. 516; *Harper v. Ely*, 70 Ill. 581.

The judgment creditor, instead of pursuing his remedy in the manner pointed out by law or equity, seeks to make other parties, who have invested thousands of dollars in this property, pay over to him the rents and profits which legally belong to them, without offering to pay the incumbrances on such property and taking it into his own possession and collecting the rents and profits himself, which he might have done if he had so chosen. *Farrant v. Lovel*, 3 Atk. 723; *Dexter v. Arnold*, 2 Sumn. 124; *Seaver v. Durant*, 39 Vt. 103; *Chapman v. Smith*, 9 Vt. 153; *Givens v. M'Calmot*, 4 Watts (Pa.), 464; *Bell v. Mayor of N. Y.*, 10 Paige (N. Y.), 49; *Daniel v. Coker*, 70 Ala. 260.

JOHNSON & MORRILL, attorneys for appellee.

By the law of this State the mortgagor is entitled to the possession of the premises, and consequently to the rents and profits thereof, up to the time of the expiration of the equity of redemption, unless a receiver be appointed, in which event the rents will be applied in reduction of the mortgage indebtedness. *Stephens v. Insurance Co.*, 43 Ill. 327; *Bennett v.*

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Matson, 41 Ill. 332; Rockwell v. Servant, 63 Ill. 424; O'Brian v. Fry, 82 Ill. 274; Davis v. Dale, 150 Ill. 239; Rooney v. Crary, 11 Ill. App. 213.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was a creditor's bill filed by the appellee upon a judgment at law recovered by him against one Olaf A. Lamborg for \$427.26, upon which an execution was duly returned wholly unsatisfied.

One John L. Barstow was the holder of certain mortgages made by Lamborg, the judgment debtor, covering certain real estate belonging to the latter, payments upon which had matured and were in default.

The appellant was the attorney and agent in Chicago, of Barstow, and on or about February 22, 1892, gave to Barstow a certain receipt and agreement in writing of that date, which, after describing the mortgages and notes secured thereby, was as follows:

"On all said notes I am to pay said Barstow seven per cent interest per annum, payable half yearly, every six months after the respective dates. The said Barstow purchased the first three notes February 10, 1892, and has paid me interest on the same from December 1, 1891, together with all additional interest accruing at that time on said three notes. All said notes are secured by mortgage or trust deeds which are to be foreclosed by me, and I agree to bid in the premises for the amounts due with costs. Immediately after the time of redemption expires, which will be fifteen months from the date of the decree of sale, I am to sell said premises. The proceeds of such sale shall be applied, first, to the payment to said Barstow of the amounts due him, with interest as above specified and which I agree shall be paid in full in any event; second, all fees and costs taxed under the decree of foreclosure, and all cash expenses incurred in the foreclosure and sale of said premises shall be paid.

If there shall be a surplus remaining after this it shall be equally divided between said Barstow and myself."

Acting in pursuance of that agreement, the appellant, as solicitor of record therein, brought foreclosure suits in the name of Barstow, and at the foreclosure sales bid in the several mortgaged premises in his, appellant's, own name, for the full amount of the several decrees, with interest, costs and expenses and solicitor's fees, and took the certificates of sale in his own name.

Appellant afterward assigned the certificates of sale to Barstow, who presumably obtained the master's deeds, and appellant quit-claimed all his interest in the premises to Barstow.

The decrees of sale in all of said foreclosure cases was entered October 27, 1892, and the master's reports of sales thereunder were all filed and approved November 28, 1892, and in each case it appeared that the sale satisfied the decree for principal, interest, costs and expenses of sale, together with solicitor's fees.

It further appears that the time for redemption from each of said sales expired February 19, 1894.

About the time the foreclosure proceedings were begun, arrangements were perfected whereby, to avoid a receivership of the mortgaged premises, Lamborg turned over the possession of the premises to appellant, who, through his agents, began to collect rents therefrom in the month of April, 1892; and the master to whom this cause was referred reported that such rents aggregated \$1,458.35, and that after allowing appellant for necessary expenses of repairs, etc., paid by or for him, there remained a net sum of \$1,106.83, as received by appellant, for which no account had been made in said foreclosure cases, and that said \$1,106.83 belonged of right to Lamborg, and that so much thereof as was necessary to pay appellee's said judgment against Lamborg, with interest and costs, aggregating \$603.36, should be paid by appellant to appellee. Decree was entered accordingly, and it is from such decree that this appeal is prosecuted.

We have examined the record with great care, and especially the testimony of appellant himself, who was called as

a witness for appellee, and also testified in his own behalf. The decree of the Circuit Court proceeded upon the theory that the agreement between appellant and Barstow constituted an equitable assignment of the notes and mortgages from Barstow to the appellant, and that appellant was liable to Lamborg, as mortgagee in possession, for the rents and profits received by him.

We think, taking into consideration not only the agreement itself, but also the testimony of appellant as to what has been done by him and Barstow under the agreement, and the continuing relations of each with the other with reference to the property, that such was the true conclusion as a matter of law.

But it is not material whether or not such was the precise legal effect of the agreement and what has been done under it; the decree is plainly justifiable upon a simpler ground.

It can not be successfully disputed but that the foreclosure decrees having been fully satisfied by sale of the mortgaged premises, and without the application of any of the rents, all rents received from the property by the appellant, prior to the expiration of the period of redemption, belong to Lamborg, no matter in what capacity appellant received them. *Dale v. Davis*, 51 Ill. App. 328; 150 Ill. 239.

For the amount thereof, Lamborg might have had his action in assumpsit as for money had and received, and his creditors may reach it by creditor's bill.

There is no dispute but that the rents came to the hands of appellant, and if he has paid any part of them to Barstow, either as interest or otherwise under their agreement, it would seem that his right for allowances for what he may have here to pay could not be questioned upon a final accounting between himself and Barstow.

The decree will be affirmed, and it is so ordered.

**Henry Toborg v. Ida May Toborg.**

1. **DECREES—On Conflicting Evidence.**—Where the evidence is voluminous and conflicting this court will not, sitting as a court of review, reverse the decree merely because its own views of the weight of the evidence might lead to a different conclusion.

**Bill for Divorce.**—Appeal from the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 13, 1896.

M. J. DUNNE, attorney for appellant.

RUDOLPH D. HUSZAGH, attorney for appellee.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellant filed his bill for divorce from the appellee, alleging as grounds therefor her adultery; and the appellee filed her cross-bill for separate maintenance, alleging as grounds therefor appellant's cruelty to her.

Upon a hearing the Circuit Court found against appellant on both bill and cross-bill, and dismissed his bill for want of equity, and entered a decree in favor of appellee on her cross-bill.

The testimony that was heard was exceedingly voluminous and conflicting, and we can not, sitting only as a court of review, reverse a decree merely because our own views of the weight of the evidence might lead us to a conclusion contrary to that reached by the chancellor. He had the superior advantage of seeing and hearing the witnesses testify, and of observing their manner on the witness stand, all of which opportunities are denied to us.

A close reading, however, of the testimony of at least one of the witnesses, who swore to most important facts, and whose testimony, if believed, would have justified, if not necessitated, a conclusion contrary to that which was reached, warrants us in saying that we agree with the



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chancellor in disbelieving him, as the chancellor must have done in order to have found as he did upon the bill.

We have more hesitation concerning the relief granted by the cross-bill. Applying, however, the same rule already alluded to, we do not feel warranted in disturbing the decree as to the merits on the main issue of the cross-bill. As to the alimony that was allowed, it is recited in the decree that it was consented to by the appellant in open court, for the purpose of saving to the parties the expense of a reference to a master in chancery; and it being expressly reserved to the Circuit Court for further order, as occasion may require, we will only say that it seems to be very large, so far as anything in the record discloses, and considering the pursuit of appellant and the station in life of the parties.

Without more discussion, we will affirm the decree, and accordingly so order it to be done.

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**The People, etc., for the use of John A. Gipsen v. Hayes  
et al.**

1. **BURDEN OF PROOF**—*Suit on Constable's Bond*.—When a suit is brought upon a constable's bond for a failure to return an execution, the burden of proof is upon the plaintiff.

2. **EVIDENCE**—*Justice's Entries*.—The statute does not require the justice to make any record or certify or include in a transcript anything concerning the failure of a constable to return process, and if he does make such a record it is not evidence against the sureties upon the constable's bond.

**Debt, on a constable's bond.** Appeal from the County Court of Cook County; the Hon. ORRIN H. CARTER, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 18, 1896.

**STATEMENT OF THE CASE.**

This was an attempt on the part of appellant to recover from F. W. C. Hayes and James R. Mann, as sureties on a constable's bond, the amount of a judgment and interest.

MASTERSON & HAFT, attorneys for appellant, contended that where the subject-matter of a negative averment lies particularly within the knowledge of the opposite party, the averment is taken as true unless disproved by that party. 1 Greenleaf, Ev., 79, p. 111 (14th Ed.), and cases cited; Great Western R. R. Co. v. Bacon, 30 Ill. 347; Williams v. People, 121 Ill. 84.

MANN, HAYES & MILLER, attorneys for appellees.

The constable was a public officer. It was his duty as such to make return of the execution within the time fixed by statute. It has been repeatedly held by our courts that every public officer is presumed to have done his duty, and this until the contrary is clearly established. Conwell v. Watkins, 71 Ill. 488; The People ex rel. v. Newberry, 82 Ill. 41; Hertig v. The People, 159 Ill. 237.

The plaintiff must clearly establish that the execution was not returned in time. People v. Newberry, 82 Ill. 41.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The statute of this State, Sec. 121 of Chap. 79, is as follows :

"If any constable shall fail or neglect to return an execution within ten days after its proper return day, or if the demand, debt or claim be wholly or in part lost, or if any special damage shall arise to any party by reason of the neglect or refusal to act, or the misfeasance or nonfeasance of any constable in the discharge of any official duty, the party aggrieved may have his action in any court of competent jurisdiction against such constable and his sureties, on the official bond of such constable, and shall recover thereon the amount of said execution and costs, with interest from the date of the judgment upon which the original execution issued."

The only question for the court to pass upon is: Should the trial court have found from the evidence that the constable did not return the execution to court within the time required by the law?

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Upon this question the burden of proof was upon the plaintiff, appellant here.

The execution was issued November 24, 1893.

At the time of the trial of this cause in the County Court this execution was, with the files of the cause in which it was issued, in court with the following return thereon :

"No property found of the within named defendant to levy on. No part paid or satisfied.

A. H. GULLY,  
Constable."

There was nothing to show when this return was made, other than what the plaintiff claimed to be evidence that it had not been made May 19, 1894. This claim of the plaintiff was based upon the following transcript :

"J. A. GIPSEN }  
vs. }  
J. F. WILSON. }

It is considered by the court that said plaintiff have and recover of the said defendant seventy-five dollars and costs of suit, and judgment ordered and entered therefor. Execution ordered and issued to Constable McCuddy, and returned by him September 9, 1893, no property found and no part satisfied. Alias execution ordered and issued to Constable McCuddy, September 21, 1893, and returned by him indorsed "No property found and no part satisfied, on the 9th day of September, 1893; November 24, 1893, alias execution ordered and issued to constable. (Plaintiff's attorney.)

(Last execution not returned to court.)

Certificate dated the 19th day of May, 1894.

[SEAL]

JOHN C. EVERETT,  
Justice of the Peace."

While the statute required the justice to make a written memorandum of all process issued and returned, it did not require that he make any record or certify or include in a transcript anything concerning a failure to return process; and there is no statute making a certificate or transcript by him evidence of what process has not been returned.

The extra-judicial certificate of the justice, in this regard, was not evidence, more especially, against persons who were not parties to the cause, of the proceedings in which the transcript was made.

The judgment of the County Court is affirmed.

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**Jas. S. Prentiss v. Whiting G. Press.**

1. PLEADING—*Defense of Gambling*.—A plea setting up the defense of gambling must not be ambiguous.

2. SAME—*Ambiguous Averments*.—The words “in which speculations it was mutually understood” are not in the language of pleading, and fall short of alleging a distinct and express contract between the parties.

Assumpsit, on a promissory note. Error to the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 13, 1896.

WM. J. TEWKESBURY and JOHN J. MCCLELLAN, attorneys for plaintiff in error.

SMITH & ELLIS and D. M. KIRTON, attorneys for defendant in error.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

To an action upon a promissory note the plaintiff in error pleaded:

“And for a further plea in this behalf, the defendant says that the plaintiff ought not to have his aforesaid action against him, the defendant, because he says that the several supposed causes of action in the said declaration mentioned are one and the same, to wit, the supposed cause of action in the said first count mentioned, and not different causes of action, and that the supposed promissory note in the count mentioned was executed and delivered by the defendant to the plaintiff for the several sums of money

claimed by the plaintiff to be due to him from the defendant for money lost by the defendant to the plaintiff in speculations on the rise and fall of the market price of wheat and other produce on the board of trade, at Chicago, in said county, in which speculations it was mutually understood by and between the plaintiff and the defendant, there was not to be, and was not in fact, any receipt or delivery of the wheat or other produce, the rise and fall in the market price of which, as aforesaid, was the subject of said speculations, and so the defendant says that the said supposed promissory note was made without any good or valuable consideration; and this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought to have his aforesaid action against him, etc.

“And for a further plea in this behalf, the defendant says that the plaintiff ought not to have or maintain his aforesaid action against him, the defendant, because he says that the several supposed causes of action in the said declaration mentioned are one and the same, to wit, the supposed cause of action in the said first count mentioned, and not different causes of action, and that the supposed promissory note in that count mentioned was executed and delivered by the defendant to the plaintiff, for money lost in gambling transactions on the board of trade, in the city of Chicago, in said county, in which gambling transactions the pretended property bought was not to be received, and the pretended property sold was not to be delivered, and that the difference gained or lost should be paid upon such transactions, and so the defendant says that the said supposed promissory note was made without any good or valuable consideration, and this the defendant is ready to verify, and wherefore he prays judgment if the said plaintiff ought to have or maintain his aforesaid action against him,” etc.

If a man wants to leave his broker in the lurch on losses paid by him in following instructions, the plea setting up the defense of gambling must not be ambiguous.

The words “in which speculations it was mutually understood” are not in the language of pleading. They “fall

short of alleging a distinct and express contract between the parties." *Black v. City of Columbia*, 19 So. Car. 412; same point in *Camp v. Waring*, 25 Conn. 520.

Evidence which in common language might prove "mutually understood" does not justify the use of that phrase in pleading, which must be according to "legal effect and operation." *Stephen Pl.* 391.

And when was it "understood?" Before or after the broker—if the plaintiff below was a broker—had so engaged himself that he could not withdraw? And on the second plea, how can a court, with no circumstances stated, know that "transactions" are gambling?

"The pleas are \* \* \* obnoxious for want of precision and accuracy, and are too uncertain and vague, both in form and substance, to entitle them to a favorable consideration." *Wagy v. Lane*, 3 Scam. 237.

The judgment is affirmed.

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### A. B. Lawther v. James S. Everts and John Burton, Administrators.

1. *AGENTS—Acts in Excess of Authority.*—An agent with authority to collect a note has no implied power to take a new note payable to his principal, or to accept, in part payment or extension, a note payable to himself.

2. *PAYMENT—Burden of Proof.*—The burden of proving payment is upon the person asserting it.

*Administration of Estates.*—Probate of claim. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the March term, 1896. Reversed, and judgment entered in this court. Opinion filed April 13, 1896.

MANN, HAYES & MILLER, attorneys for appellant.

GEO. W. HALL, attorney for appellees.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.  
This appeal is from a judgment against the appellant for

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costs of suit, rendered by the Circuit Court upon an appeal by appellant to that court from an order of the Probate Court disallowing a claim there presented by the appellant against the estate of appellees' decedent, Edward A. Everts.

From 1887 until his death on April 7, 1894, one Charles W. Griggs, an attorney at law, was the Chicago agent for the appellant, a resident of Syracuse, N. Y., for loaning money. During that time appellant sent large amounts of money to Griggs and authorized him to loan the same upon notes and other securities to be approved by Griggs, and Griggs was also authorized to collect the principal and interest of the loans he made, at the maturity thereof.

Among the loans so made for appellant by Griggs was one of \$2,000 to said Edward A. Everts, on October 20, 1892, for which Everts gave his promissory note of that date, payable to the order of appellant ninety days after date, with seven per cent interest. The note was delivered to Griggs, and he paid to Everts \$2,000 of appellant's money, and reported the loan to appellant, and retained the note in his possession as the agent and attorney of appellant for purposes of collection at its maturity.

Griggs had previously, on various occasions, acted as attorney for Everts. When the note matured, or about that time, Everts paid to Griggs \$1,018.08, in check and cash, and gave to Griggs his, Everts', new note for the like sum of \$1,018.08, payable in ninety days to the order of Griggs, and thereupon Griggs canceled the original note of \$2,000, and delivered it to Everts, who retained it until his death. Griggs procured said new note to be discounted at the Commercial National Bank, and Everts paid it at maturity.

Appellant makes no claim against appellees for the \$1,018.08 paid to Griggs by check and in cash.

The foregoing facts, with numerous additions which we do not think it to be necessary to mention, were, in substance, stipulated and agreed to by the parties.

The original note for \$2,000, so canceled and delivered by Griggs to Everts, was introduced in evidence, and showed what purported to be an indorsement by appellant to

Griggs, but it was proved that appellant's name there shown was a forgery.

Other evidence was admitted on the trial, over the objections of appellant, which tended to show that Griggs had on other occasions exercised the authority to extend loans, either in whole or in part, by taking new paper or security, and had reinvested moneys of appellant which had been paid in, and that appellant had ratified such acts, at least impliedly, by making no objections to such a course of business when informed of it by Griggs, and by receiving the benefit of such dealings. So far as appears, all the doings of Griggs from which ratification of them by appellant may be implied, were reported by Griggs to appellant by letter, but in every such instance it seems that the new paper taken by Griggs was taken in the name of appellant, and it nowhere appears in the record that Griggs ever before or after these transactions with Everts, took any paper payable to his own order, or that he ever indorsed any other paper to himself that was taken in appellant's name.

It is strenuously insisted that the letter-press copies kept by Griggs, of letters purporting to have been written by him to appellant, relating to other transactions between them, were improperly admitted in evidence, both on the ground that the proper foundation for such evidence had not been laid, and that they were not competent evidence, for various assigned reasons; but conceding that they were properly admitted, we do not find that they afford a valid and sufficient defense to appellant's claim.

They do not afford any evidence that Griggs ever reported to appellant a single transaction in which he had taken paper or securities belonging to appellant, or anybody else, in his own name, or that he had ever indorsed to himself, or used for his own benefit, any of the paper which he ever handled for the appellant.

Assuming that Griggs' authority was ample to collect the note in question, either in whole or in part, and that for the part not collected, he had authority to take new paper, payable to the appellant, still, there was no evidence whatever



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that Griggs had authority, either express or implied, to accept in part payment or extension, the note for \$1,018.08, payable to the order of himself.

Everts could not pay his debt to appellant by giving a note to appellant's agent, payable to the order of such agent individually.

Even if, under the circumstances, the indorsement of appellant's name on the back of the \$2,000 note were not a forgery, still it is clear that the indorsement passed no title to Griggs as against appellant, and conferred no new authority upon Griggs.

Griggs' authority was no greater, as concerns the note, after the indorsement than before, and Everts was bound to so know.

When, therefore, Everts, in attempted payment of the note, gave his new note to Griggs personally, it was as if he had not paid his debt to appellant, and not having paid it, his representatives, the appellees, are liable.

The opinion in *Scott v. Gilkey*, 153 Ill. 168, is instructive in this connection.

The suggestion is made in appellees' brief, that from anything appearing, it may be that appellant received from Griggs the money he obtained when he discounted the new note at the bank, or that Griggs may have reimbursed appellant in some other way.

The burden of proving payment was upon those who asserted it. *Hanke v. Cobiskey*, 57 Ill. App. 267.

Holding, as we do, that the record discloses no defense to the appellant's claim, the judgment will be reversed, and the cause having been submitted to the Circuit Court without a jury, we will enter judgment here in favor of the appellant for the amount shown by the record to be due him. Reversed, and judgment here.

**George M. Eckels, Adm'r, v. The Chicago Ship Building Company.**

1. **NEGLIGENCE**—*Unprotected Gearings*.—It is negligence for employers to so arrange their plants as to expose their employes to needless danger.

**Trespass on the Case.**—Death from negligent act. Error to the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 13, 1896.

DUNCAN & GILBERT, attorneys for plaintiff in error.

WALKER & EDDY, attorneys for defendant in error.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The plaintiff below, as well as here, sues as the administrator of Frank Kukral, to recover damages for his death, caused, as is alleged, by the negligence of the defendant.

An ordinance of the city, pleaded by the plaintiff, required "gearing," "when so located as to endanger the lives and limbs of" operatives, to be, as far as practicable, covered.

In the shop of the defendant was a very massive shearing machine, used for shearing iron. Part of its construction was two geared wheels, meshing into each other at a height of six feet five inches above the floor and revolving inward on the exposed side. It was practicable to cover that side. Under and about the machine scrap had accumulated—some beside the knives of the machine, not fallen down to the other scrap. The scrap was—as witness remembered it—a pile of eighteen inches in height and four feet in diameter.

To get the scrap from beside the knives first, it would be necessary to step upon the pile.

Frank was a slender lad, four feet, ten inches high, a

"good, smart" boy, thirteen years old, working in the shop on the day he was killed under the direction of one Schule. Schule was starting for instructions when Frank said, "I shall go back of the machine and take the scrap out while you are gone," and Schule replied, "All right, go on."

He went, and the next that is known of him he had been drawn by his right arm into the mesh of the gearing and so injured that he died. The brief of the plaintiff says:

"Nobody saw the exact manner of his being caught. Whether he slipped or missed his footing on the irregular surface of the scrap pile and involuntarily extended his hand to protect himself, or was thus thrust against the gearing, or whether his sleeve caught in the cogs and drew him in, can not be certainly told; but that in some way he became involved in the exposed gearing is fairly and reasonably certain."

That it is negligence for employers to so arrange their plant as to expose their servants, whether infants or adults, to needless dangers, is a doctrine often acted upon by this court. *McCormick Harvesting Machine Co. v. Burandt*, 37 Ill. App. 165; *Bradley v. Sattler*, 54 Ill. App. 504.

Except that here the deceased was an infant, this case resembles *Pitrowsky v. Reedy Elevator Co.*, 54 Ill. App. 253, with the danger, if danger there was, more remote than here.

Can it be said that the mesh of gearing six feet five inches above a floor, does endanger lives and limbs? Could it be reasonably anticipated that an employe could ever be caught in it? It is true that these are questions of fact, but if in the facts there is nothing tending to an affirmative answer, then the court was right in instructing the jury to find for the defendant.

In the absence of any evidence of the manner of this tragic accident, we hold that the instruction was right, and the judgment is affirmed.

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**John J. Byrne v. Chicago General Railway Co. and City of Chicago.**

1. *CITY OF CHICAGO—Power in Granting Privileges to Street Railroad Companies.*—The city of Chicago is not limited to a simple denial or granting of a privilege or franchise to a street railroad company. It may prescribe the terms upon which the privilege shall be conditioned if conferred, and by accepting the privilege so burdened the company becomes bound to comply with the terms imposed.

2. *SAME—License Fees.*—A license fee may be properly exacted by the city of Chicago from a street railroad company for the running of its cars in the streets, and where a company accepts a franchise from the city burdened with a provision for a license fee for each car run, etc., and acts under such franchise, such acceptance makes a complete and valid contract with reference to the imposed license fees.

**Bill for an Injunction.**—Error to the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 13, 1896.

SMITH & BARTON, attorneys for plaintiff in error.

A street railway company is a common carrier of passengers for hire, and as such is subject to all the rules of law relating to common carriers, and among these is the one that prevents it from charging more than what is reasonable for its services. *C. C. Ry. Co. v. Engel*, 35 Ill. App. 491; *N. C. St. Ry. Co. v. Williams*, 140 Ill. 275; *N. C. St. Ry. Co. v. Wrixon*, 51 Ill. App. 308; *N. C. St. Ry. Co. v. Cook*, 145 Ill. 553; *N. C. St. Ry. Co. v. Coitt*, 50 Ill. App. 640; *Ruggles v. People*, 91 Ill. 256; 108 U. S. 526; *C., B. & Q. R. R. v. Iowa*, 4 Otto (U. S.), 156; *Munn v. Illinois*, 69 Ill. 80; 4 Otto (U. S.), 113.

A street railway company is quasi-public in its character, and, like a general railway company, owes duties to the public which can not be abridged by contract. *M. & O. R. R. Co. v. People*, 132 Ill. 559-570; *Bestor v. Wathen*, 60 Ill. 138; *Linder v. Carpenter*, 62 Ill. 309; *Marsh v. Fairbury*, etc., *R. R.*, 64 Ill. 414; *St. L., J. & C. R. R. Co. v. Mathers*,

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71 Ill. 592; 104 Ill. 257; *People v. C. & A. R. R.*, 130 Ill. 175.

The city of Chicago has, under its expressed police powers, authority to impose license fees on street railway companies. *Allerton v. Chicago*, 6 Fed. Rep. 555; *Frankfort, etc., Pass. Co. v. Phila.*, 58 Pa. St. 119; Clause 42, Sec. 62, Chap. 24, R. S.

When a municipality, under its police powers, is authorized to require payment of a license fee, the same must be uniform upon all of the class licensed, and it may be sufficient to compensate for the extraordinary policing demanded by the carrying on of the occupation licensed. *East St. Louis v. Wehrung*, 46 Ill. 392; *Walker v. Springfield*, 94 Ill. 364; *Braun v. Chicago*, 110 Ill. 186; *Wiggins Ferry Co. v. East St. Louis*, 102 Ill. 560; *Concordia Cemetery Ass'n v. M. & N. W. R. R. Co.*, 121 Ill. 203; *Cooley, Const. Law*, 6th Ed. 200; *Cairo v. Fenshaw Bros.*, 54 Ill. App. 112; *Zanone v. Mound City*, 103 Ill. 552.

A municipal corporation can not grant for a private exclusive use, any part of a street; the use must be for the public, though the trustee or one who holds for the public use may be private. *Moses v. P., Ft. W. & C. Ry. Co.*, 21 Ill. 516; *C., D. & C. Co. v. Garrity*, 115 Ill. 155; *C., B. & Q. R. R. v. Quincy*, 126 Ill. 563; *Field v. Barling*, 149 Ill. 556.

A municipality can not contract except as it is authorized, and is confined in its sources of revenue to those enumerated in its charter. *Hamilton v. Shelby*, 33 N. E. Rep. 1007; *Nashville v. Sutherland*, 21 S. W. Rep. 674; *City of Cairo v. Bross*, 101 Ill. 478; *Mather v. Ottawa*, 114 Ill. 659; *Chicago v. McCoy*, 136 Ill. 344, 351; *Twinning v. Elgin*, 38 Ill. App. 356, 361; *McKinney v. Alton*, 41 Ill. App. 508; *Champaign v. Harmon*, 98, 491; *Gaddis v. Richland Co.*, 92 Ill. 119; *Cook County v. McCrea*, 93 Ill. 238; *La Salle Co. v. Simmons*, 5 Gilm. 513; *Aberdeen v. Honey*, 8 Wash. 251; *Herzo v. San Francisco*, 33 Cal. 134.

WILLIAM G. BEALE, corporation counsel; GEORGE A. DU-

PER, assistant corporation counsel; ELBERT H. GARY, special counsel; attorneys for city of Chicago, defendant in error.

The complainant, as a stockholder, has stated no facts justifying his interference on behalf of the corporation. Hawes v. Oakland, 104 U. S. 450; Detroit v. Dean, 106 U. S. 537; Wheeler v. Pullman I. & S. Co., 143 Ill. 197; Bruschke v. North Chicago S. Verein, 145 Ill. 445; Gamble v. Queens Co. Water Works, 123 N. Y. 99; Thompson's Com. on Law of Corp., Vol. 4, Secs. 4500, 4508, 4510, 4566 and 4567; Story's Eq. Pleading, 10th Ed., Sec. 126; Higgins v. Lansingh, 154 Ill. 345.

The bill shows no legal injury done or threatened to the corporation. People v. City of Chicago, 27 Ill. App. 217.

The special ordinance under which the General Railway Company and its lessor have been operating their lines is not a mere license but a contract between the city and the company, equally binding on both. The rights acquired thereunder by the company are property. Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co., 32 Barb. 364; People v. O'Brien, 111 N. Y. 1; R. R. Co. v. Delamore, 114 U. S. 501; N. Y. Gas Light Co. v. Louisiana G. L. Co., 115 U. S. 659; Gas Light Co. v. Town of Lake, 130 Ill. 55, 56; City of E. St. Louis v. Wehrung, 46 Ill. 392.

The special ordinance was not *ultra vires* but was clearly within the statutory powers of the city of Chicago. 2 Dillon on Mun. Corp., 4th Ed., Sec. 706; Elliott on Roads and Streets, 565; Rev. Stat. of Ill., Chap. 66; City of Phil. v. Ridge Ave. Ry. Co., 22 Atl. Rep. 695; Hunt v. Chicago, H. & D. Ry. Co., 121 Ill. 638.

The special ordinance repealed the general ordinance in so far as this company and its lessor are concerned. Booth v. Town of Carthage, 67 Ill. 103; 23 Am. & Eng. Enc. of Law, 430, 483; Devine v. Cook County, 84 Ill. 590; State v. Morristown, 33 N. J. L. 61; Hussey v. Mech. Nat. Bank, 10 Pick. 421; State v. Vic De Bar, 56 Mo. 395; Dewey v. Central Car Co., 42 Mich. 402; Wilson v. Ohio & Miss. Ry. Co., 64 Ill. 542; 1 Dillon, Mun. Corp., Vol. 1, Secs. 87, 88 and notes; Allerton v. Chicago, 6 Fed. 555.

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The railway company, and therefore the plaintiff in error also, are estopped to deny the validity of the special ordinance. *Schwuchow v. City of Chicago*, 68 Ill. 444; *Wiggins Ferry Co. v. E. St. Louis*, 102 Ill. 560; *Launder v. City of Chicago*, 111 Ill. 91.

C. C. & C. L. BONNEY and LYMAN M. PAINE, attorneys for Chicago General Ry. Co.

The ordinance of the defendant company is a contract under which vested rights have been acquired. *Belleville v. Horse Railway*, 152 Ill. 186.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The plaintiff in error is a stockholder in the Chicago General Railway Company, and filed this bill for an injunction to restrain the city of Chicago from compelling said General Railway company to pay any sum or sums of money computed or to be computed under section 7 of a special ordinance of the city of Chicago, passed February 8, 1892.

To his bill the defendants in error separately demurred, and such demurrers having been sustained, the bill was dismissed for want of equity.

The correctness of that decree of dismissal is called in question.

The Chicago General Railway Company is, and has been since April 3, 1894, an operator of all the lines of street railroads constructed and operated by the West and South Towns Railway Company, under two special ordinances of the city of Chicago granting the right to said Towns Railway company to lay down and operate a street railway upon certain of the city streets, and passed, respectively, February 8, 1892, and April 5, 1893.

Said section 7 is a part of the said special ordinance passed February 8, 1892, and is, together with sections 8 and 12 of the same special ordinance, as follows:

"7. The said company shall pay into the city treasury of the city of Chicago, for the use of said city, the sum of

fifty dollars (\$50) as an annual license fee for each and every car used by said company in the manner following : In computing the number of cars upon which said license charge may be imposed, thirteen round trips, when the car is used in the transportation of passengers, shall be taken as equivalent to one day's use of one car; one thirteenth of such round trips during each quarter shall be divided by the number of days in such quarter; such quotient shall be the number of cars subject to such license fee; provided, however, that such cars shall not already be liable for the payment of a license fee on one or the other lines of this company or its connections. The president or other chief officer of said company shall, under oath, make report quarter yearly to the comptroller of the city of Chicago of the whole number of cars so run by said company, and, at the same time, pay to said comptroller twelve and one-half dollars (\$12.50) for each car to be ascertained as above prescribed in this section. The first quarter shall begin on the first day upon which the said company shall run a car or cars for the carriage of passengers.

8. The rights, privileges and franchises herein conferred are granted upon the further condition and consideration that on and after December 1, 1895, the said company or their legal assigns, or any person, firm, company or corporation in any way claiming under or through them or operating the road herein authorized, shall pay into the city treasury of the city of Chicago, annually, for each and every lineal mile of their track laid under the provisions of this ordinance, and a proportionate amount for any fraction of a mile laid as herein authorized, the sum of five hundred dollars (\$500). The payments under the conditions herein prescribed shall be due and payable on the first day of December of each year, and the first payment due, as herein prescribed, to be made on the first day of December, 1896.

12. The franchises granted by this ordinance, except as herein specially provided, are granted subject to all general ordinances of the city of Chicago concerning horse railroads now in force, or which may hereafter be passed by said city under its police powers."



And section 2 of the said special ordinance of April 5, 1893, contained the following provision, to wit:

“All cars run on said line shall pay an annual license fee of fifty dollars (\$50) for each year, to be computed as provided in said ordinance of February 8, 1892.”

In addition to the provisions so quoted from said special ordinances, under which the Towns Railway company, the lessor of the General Railway company, obtained its right to lay down tracks and operate a street railway, there is, and was at the time of the passage of said two special ordinances, and had been for many years before that time, a general ordinance of said city in force (section 1506 of the Municipal Code) concerning license fees to be paid by the operators of street railway cars, as follows:

“It shall be the duty of every person, firm, or corporation engaged in the occupation of operating and running street cars for the conveyance of passengers upon any line of horse or city railway, within the city of Chicago, in the month of April of each year, to apply for and obtain from the city of Chicago a license therefor, for which said license every such person, firm or corporation shall, at the time application is made for such license, pay into the treasury of said city the sum of fifty dollars for each car operated and run or proposed to be operated and run by such person, firm, or corporation, during the year. Any person, firm, or corporation engaged in the occupation aforesaid failing or refusing to take out a license therefor, as above required, shall be subject to a fine of not less than five dollars, and not more than two hundred dollars; and a failure to obtain such license for each day that the same shall continue shall be deemed a separate and distinct offense, and violation of this article.”

Besides alleging the facts so set out, the bill alleges, as set forth in the abstract, as follows:

“That besides said defendant company, there are six or more separate and distinct corporations, each operating separate and distinct lines of street railways, along the streets within the corporate limits of Chicago, under ordi-

nances, some of which contain sections similar to those above quoted from the ordinances of February 8, 1892, and April 5, 1893, and some making no mention whatever of licenses or license fees; that since April 3, 1894, said Chicago General Railway has computed license fees to be paid into the city treasury not on the basis of the actual number of cars run, but upon the basis of the number of trips made by all cars of said company; that said company is at all times liable in law to pay a license fee under said section 1506 of the Municipal Code, and the same is not waived, liquidated or satisfied in whole or in part by any payments made under section 7 of the ordinance of February 8, 1892; wherefore any payment not made in pursuance of said general ordinance is a misappropriation of the funds of said company; that said company owns thirty-three cars, and operates or proposes to operate them on said lines, and should have paid as license fees therefor \$1,650, and is still liable therefor. Nevertheless, regardless of complainant's protests and remonstrances, it now threatens to pay said city \$250, computed to be one quarterly installment under said section 7, and will pay the same unless restrained; whereby the funds of said company will become unlawfully misappropriated and wasted, to the injury of complainant as a stockholder."

And the prayer of the bill is, that said section 7 of said special ordinance of February 8, 1892, be declared *ultra vires* and void, and that the city be perpetually enjoined from compelling payment of any sum computed or to be computed under said section 7, and for general relief.

The question so presented is whether the special ordinances referred to are valid corporate acts of the city of Chicago, and binding upon the railway company.

Of that we do not think there can be much doubt. It is too late to deny to the city the power to grant privileges, either by way of binding contract or of revocable license, to street railway companies to lay down tracks and operate them in and along the streets of the city, or the power of such companies to agree with the city concerning the terms upon which they will accept such privileges.

The ordinances of which the quoted sections were a part, constitute the authority under which the railway company laid its tracks and operates its cars, and section 7 was one of the terms to which the company agreed when it accepted the ordinances; and it is immaterial whether the accepted ordinances shall be treated as contracts or as mere licenses.

The city was not limited to a simple denial or granting of the privilege, but might prescribe the terms upon which the privilege should be conditioned, if conferred; and by accepting the ordinances so burdened with the terms, the railway company became bound to pay the license fee so long as it enjoys the privileges conferred by the ordinances. 2 Dillon on Mun. Corp. (4th Ed.), Sec. 706.

And a license fee could properly be exacted by the city, and being agreed to, the company can not avoid it. Elliott on Roads and Streets, 565.

It would be most unjust to hold that the city, having the power to either confer or refuse the privilege, and having exercised the power upon terms accepted by the grantee and long acted upon, should be denied enforcement of the terms. If on no other ground, the railway company should be prevented by the familiar doctrine of estoppel from escaping its liability to pay.

And what would be denied to the company in such regard, if it were the actor in these proceedings, should be denied to its stockholders.

We do not consider it necessary to speak of the effect of these special ordinances upon the general section 1506 of the municipal code.

It is enough that the ordinances, accepted and acted under, make a complete and valid contract with reference to the imposed license fee; and whether the ordinances operated to repeal said section 1506, or operated to create an additional burden upon the company, is not necessarily here involved. And the same might be said of the alleged fact concerning the terms upon which other companies were granted similar privileges. By accepting the ordinances and acting under them, a contract was entered into, or, at

least, a license was obtained by the railway company, and it does not matter whether the bargain that the particular company so obtained was as good as that which some other companies, exercising similar privileges, enjoy, or not.

There is nothing partaking of the element of taxation, or of the establishment of general license fees upon occupations, and therefore demanding uniformity, involved in this question, where, simply, in consideration of the conferring of special privileges in certain public streets, the donee of such privileges agreed to pay a certain sum for each car it should operate upon said streets.

The terms imposed by section 7 were clearly within the power of both parties to agree to, and we can see no ground upon which the decree should be reversed. It will therefore be affirmed.

MR. JUSTICE WATERMAN.

Whether either special ordinance was more than a license, as well as whether by either the general ordinance was repealed, are questions, neither of which is, as I understand, involved in this case.

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### Harry M. Greene v. The Board of Trade.

1. *BY-LAWS—Members of Associations Bound by.*—A person who of his own will and accord becomes a member of the Board of Trade, voluntarily agrees to be bound by its rules and by-laws.

2. *SAME—Rights of Members in Trials Under.*—A member of the Board of Trade has a right to a trial upon charges against him as such member, the proceedings of which are not repugnant to natural justice, but this does not include a right to be defended by professional counsel.

3. *SAME—Denial of the Right to be Defended by Counsel.*—A by-law of the Board of Trade, providing that in investigations before the board of directors, or before any committee of the association, no party shall be allowed to be represented by professional counsel, is not invalid.

**Bill for Injunction.**—Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 13, 1896.

## STATEMENT OF THE CASE.

This was a bill filed by appellant against appellee to enjoin the appellee from trying appellant for alleged violation of its by-laws, viz.: trading in differences on the market and reporting to customers fictitious sales.

An *ex parte* injunction was granted on the bill of complaint, sworn to by appellant, and answer and affidavits were filed by appellee and an additional affidavit filed by appellant, and upon the hearing upon bill, answer and affidavits, the injunction was dissolved and the bill dismissed.

From the bill, answer and affidavits, it appears that the Board of Trade is a great public corporation; that it owns and holds property of the value of \$1,500,000; that its memberships are valuable; that it is alleged that the transactions on the exchange, fix and determine the value of all kinds of produce and provisions in the commercial centers of the world; that appellant is a member of said board; that his membership is of pecuniary value; that he has pending contracts with customers living in different cities of the United States, for the future delivery and receipt of grain, to the amount of over \$75,000, upon which he has received over \$20,000 and paid out over \$10,000 to others, and that it is alleged that his suspension or expulsion will not only work irreparable damage to him, but to his clients and customers also; that certain members of its directory are alleged to have conspired to injure him and deprive him of the privileges of said Board of Trade; that the directory is composed of eighteen members; that three of them, Jones, Nash and Hill, were appointed a committee to investigate charges against him; that this committee called witnesses before it without notice to and without the knowledge of appellant, had them sworn and examined them; that Jones, the chairman of the committee, then made formal charges against appellant and summoned appellant to appear for trial three days from that time; that three members of this committee were to sit as three of the judges who were to try him; that the offense with which he was charged was a grave one; one punishable under the laws of this State by

fine and imprisonment; and that the by-laws of the board provide that no member on trial before the directors shall be allowed the assistance of professional counsel.

MONROE & THORNTON, attorneys for appellant.

The constitution of this State secures to the accused the right of defense in person and by counsel. That is its policy and the policy of our law. It has been held that the clause of the Federal constitution prohibiting the enactment of *ex post facto* laws applies to the by-law of a corporation. *People v. Fire Department*, 31 Mich. 458; *Howard v. Savannah*, T. U. P. Charlt. (G. A.), 173.

The right of counsel in a civil suit has never been denied. To allow such has always been the policy of the law. To prohibit a party appearing by proper counsel has always been deemed an error sufficient to reverse a cause. And no doubt, where no right of appeal lay from the judgment to be rendered on a trial held by an inferior court, a refusal to allow proper counsel to appear for a party would be sufficient cause to justify the interference of a court of superior jurisdiction. See *Gebhard v. New York Club*, 21 Abb. N. C. 252; *In re Monckton*, 3 Notes of Cases, Ecclesiastical Supp. 62; 2 Stephens' Law of Clergy, 977 (Ed. 1848); *Murdock v. Phillips Academy*, 12 Pick. (Mass.) 263; *Nelson v. Board of Trade*, 58 Ill. App. 399.

A by-law to be valid must be reasonable. *Cartan v. F. M. U. B. Society*, 3 Daily 20; *People v. Throop*, 12 Wend. 183; *Palmetto Lodge v. Hubbell*, 2 Strobb. L. 457.

A by-law made in pursuance of an express power to make such laws, if contrary to the common law, or to a legal enactment, is void. Every by-law must be reasonable and lawful. *State v. Union Merchants' Exchange*, 2 Mo. App. 96.

The power to enact by-laws is limited by the nature of the corporation and the laws of the country. It can make no rule which is contrary to law, good morals, or public policy. *Sayre v. Louisville, etc., Asso.*, 1 Duval (Ky.) 143; S. C., 83 Am. Dec. 613.

A by-law must not be contrary to a policy of the law. *Goddard v. Merchants' Exchange*, 9 Mo. App. 290, 295; 78 Mo. 609.

The rules of the club can not be contrary to natural justice. *Brett, L. J.*, in *Dawkins v. Antrobus*, L. R., 17 Ch. Div. 630; *Seaton v. Gould*, 5 Times L. Rep. 309.

Nor can a by-law be valid which violates those fundamental principles of right embodied in the common law. 1 *Thompson on Corp.*, Secs. 1014, 1015.

What is true concerning unincorporated associations is much more so of voluntary incorporated associations. *White v. Brownell*, 4 Abb. Pr. (N. S.) 162, 192; S. C., 2 Daly 329, 358; *Evans v. Philadelphia Club*, 50 Pa. St. 117; *Otto v. Tailors, etc., Union*, 75 Cal. 308.

Courts of chancery have supervision and control of all unincorporated societies or associations. With respect to them they have the power of prevention of acts contrary to law and prejudicial to the interests of the community or the rights of individuals, and can afford specific relief where a recovery in damages would be an inadequate remedy for the wrong. *Ebbinghaus v. Killian*, 1 Mack (D. C.), 247; S. C., 9 Wash. L. Rep. 627; *Kisor's Appeal*, 62 Pa. St. 428.

When the proceedings resulting in the expulsion of a member are contrary to natural justice a court of equity may interfere. *Hutchinson v. Lawrence*, 67 How. Pr. 38, 42.

An injunction has been issued to prevent the arbitrary removal of a schoolmaster. *Willis v. Child*, 13 Beav. 117, 129; *Powell v. Abbott*, 9 W. N. Cas. (Pa.) 231; *Albers v. Merchant's Exchange*, 39 Mo. App. 583; *Seaton v. Gould*, 5 Times L. Rep. 309; *Tipton Fire Co. v. Barnheisel*, 92 Ind. 88.

GREEN, ROBBINS & HONORE, attorneys for appellee.

Neither courts of law nor courts of chancery can interfere with the exercise by the Board of Trade of its disciplinary powers, either before or after it has tried the member.

The law does not permit suits to enjoin a trial by an asso-

ciation for the purpose of disciplining a member. *Harlow v. Dehon*, 111 Mass. 195; 1 *Thompson on Corp.*, Sec. 913.

A court of chancery can not enjoin the mayor and aldermen of a city from removing a party from office, because the remedy is complete at law, by mandamus after removal, to restore to office. *Delehanty v. Warner*, 75 Ill. 185.

A member of the Board of Trade can not repudiate or complain of the judgment rendered by a tribunal of his own choosing, and under rules by which he pledged himself to abide. *Pitcher v. Board of Trade*, 121 Ill. 412.

After trial a court of law can not, by mandamus, interfere with the disciplinary powers of the Board of Trade over its members. *People ex rel. Rice v. Board of Trade*, 80 Ill. 134.

How far the courts can interfere after a hearing with the exercise of the disciplinary powers of the Board of Trade over its members, has been the subject of controversy, but even in such case it has been uniformly held by our Supreme Court that chancery has no jurisdiction. *Fisher v. Board of Trade*, 80 Ill. 85.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This proceeding is in effect to restrain the appellee from proceeding to try a member whom it is alleged has violated the law of such board. It is not claimed that the board is about to try appellant in a manner not in accordance with its rules and regulations. It is the rules themselves of which appellant complains.

Appellant, of his own free will and accord, became a member of the board; voluntarily agreed to be bound by its laws, of which he now complains. If its regulations for the trial of alleged offenders are, as he urges, oppressive and unjust, he might have avoided the effect of such tyranny by keeping outside its fold, as do the great mass of merchants and traders in the city of which he is a citizen.

Appellant complains that three members of the directory having, in accordance with the rules of the board, investi-



gated complaints against him, have preferred charges, and are themselves to sit, with others, among the number of his judges.

As to such proceeding, appellant cites the case of *People v. McCoy*, 20 Ch. Legal News, 151; 37 Albany, L. J. 131, in which it was said: "It can not be tolerated that among a free people, a board, combining within themselves the functions of accuser, prosecutor, judge and jury, should exercise such power."

The quoted declaration was not made as to a trial of one who had voluntarily become and was a member of a society in accordance with whose rules he was about to be tried.

Appellant is entitled to a fair trial, to one whose proceedings are not repugnant to natural justice; but we do not think that this includes a right to be defended by counsel. Whatever may be the right in this regard of an accused in an ecclesiastical court or in one of the common tribunals of the land, we see no reason for holding that the by-law of the Board of Trade, denying the privilege of defense by counsel, is invalid.

Whether appellant will or will not receive by the directors of the Board of Trade a fair trial, as likewise the effect of such trial, can not be known in advance.

The result of the allowance of injunctions such as was sought in this case, would be to transfer to the chancery court the trial of alleged offenses against the rules of clubs, churches, and societies in which the membership had pecuniary value, and the complaining member charged that he could not receive a fair trial in such organization.

We regard the case of *Sturges v. Board of Trade*, 86 Ill. 441, and *Baxter v. Board of Trade*, 83 Ill. 146, as decisive of this.

The decree of the Superior Court is affirmed.

**Anna L. Martin et al. v. Sarah A. Cole et al.**

1. ERROR AND APPEAL.—*From Final Orders.*—A writ of error does not lie until there is a final decree as to the matters in controversy.

**In Equity.**—Error to the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the March term, 1896. Writ dismissed. Opinion filed April 13, 1896.

**STATEMENT OF THE CASE.**

This was a bill by Sarah A. Cole, widow of Geo. W. Cole, making her two children and The Bankers & Merchants' Association parties defendant, praying for a receiver to conduct the business of the corporation. The bill alleges that the defendant is a corporation, a collection agency; that Geo. W. Cole in his lifetime was possessed of all the stock of the corporation, and was its sole manager; there was a large amount of business on hand demanding immediate attention; a large amount of money in bank which the bank refused to pay out because there was no one authorized to receive it; that Geo. W. Cole was killed by the cable cars, October 29, 1895, and complainant and defendants Cole are his sole heirs and representatives, and have no experience in the business, and pray that a receiver be appointed to take charge of the business.

O. H. Smith was appointed receiver on an *ex parte* order, November 4th, and took charge of the business November 5th, finding Anna L. Martin and Henry F. Martin in possession and running the business as stockholders and officers of the corporation.

Anna L. Martin and Henry F. Martin came in and filed their answer, setting up their ownership of the stock of the corporation, and on bill and answer the matter was referred to a master in chancery.

The decree of the court, to reverse which this writ of error is prosecuted, after making various findings, is as follows:

“The court doth further find that after the death of the

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said George W. Cole, the said Bankers & Merchants' Association ceased to do the business for which it was organized, within the terms of section 25 of the statute entitled "Corporations," and that it is for the best interests of the creditors that the receiver heretofore appointed be continued in said receivership.

It is further ordered, however, that said receiver do not proceed to wind up or dissolve said Bankers & Merchants' Association, but shall carry on the same as heretofore, until such time as the contest over the alleged will of George W. Cole, deceased, and the rights of the parties under the same, are definitely determined.

SAMUEL RICHOLSON and MARSHALL DRAKE, attorneys for plaintiffs in error.

FRANK W. BLAIR, attorney for defendants in error.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

No final decree as to the matters and things in controversy has been made, but merely that the receiver for an indefinite time continue to carry on the business of the Bankers & Merchants' Association. The only final order was that Anna and Henry Martin pay the costs of the proceedings.

Such order was premature; it is therefore reversed.

As to all other matters, findings and orders of the Circuit Court, the writ of error is dismissed.

Order as to costs reversed; as to all other matters, writ of error dismissed.

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George B. Swift, Mayor of the City of Chicago v. People of the State of Illinois ex rel. John Powers et al.

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1. *MANDAMUS—Issue of, Discretionary.*—Although a *prima facie* right to a mandamus is shown, courts exercise a discretion as to issuing it. Such discretion, however, can not be arbitrary, or governed by

fancy, caprice or prejudice. It must be a sound discretion, guided by law, legal and regular.

2. *SAME—Saloons in Residence Localities.*—The courts will not compel, by a writ of mandamus, the mayor of Chicago to issue a license to keep a saloon in a locality where a saloon would be a nuisance.

3. *SALOON—Right to Keep, Not Absolute.*—The right to keep saloons in any and all quarters of a city, in each block and beside any home, is not an absolute right.

**Mandamus**, to compel the issuing of a saloon license. Error to the Superior Court of Cook County; the Hon. JAMES GOGGIN, Judge, presiding. Heard in this court at the March term, 1896. Reversed. Opinion filed April 18, 1896.

#### STATEMENT OF THE CASE.

The relators, desiring to keep a saloon at 3300 Wabash avenue, Chicago, applied to the respondent for a license. The respondent refused to grant them a license for reasons hereinafter stated, whereupon they filed a petition for a writ of mandamus, in which they set out the ordinances of the city on the subject.

Among other provisions in said ordinances, it is provided in section 1850:

“The mayor of the city of Chicago shall from time to time grant licenses for the keeping of dram shops within the city of Chicago, to any person who shall apply to him in writing, upon said person furnishing sufficient evidence to satisfy him that he or she is a person of good character,” etc.

The petitioners allege that they are persons of good character; that they filed the necessary bond, tendered license fees, etc., and fully performed all that the ordinance required of them in that behalf.

The respondent filed an answer in which, among other things, he said:

“This respondent, further answering, admits that he did refuse to issue a license to said petitioners; that the reason for such refusal was and is that it is not anywhere in and by said ordinance, or by any ordinance or ordinances of the city of Chicago, provided that the applicant for a saloon

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license shall or may designate the place to be named in such license, but that said ordinances provide that this respondent shall issue all licenses, and that any license so issued shall authorize the person or persons therein named to keep a dram shop, to sell, give away or barter intoxicating liquors in quantities less than one gallon at the place designated in the license.

"This respondent says that he has been at all times willing, and now is willing, and hereby offers, upon payment of the license fee being made by said petitioners, to issue a license to such petitioners to keep a dram shop or saloon at any place, or upon any such premises within the city of Chicago as said petitioners may select or designate, and which shall not be subject to the objections hereinafter in the next paragraph of this answer mentioned and set forth; but this respondent has refused and is unwilling to issue a license designating the location of the place in which such business shall be conducted, at 3300 Wabash avenue, in the city of Chicago.

"This respondent, further answering, says that the reason why he has refused to issue a license to said petitioners to conduct a business at the aforesaid 3300 Wabash avenue is that said premises so desired to be devoted to saloon purposes are within a purely residence neighborhood, and that a saloon in such district would be a nuisance.

"This respondent further answering says, as showing the character of said neighborhood, that said number 3300 Wabash avenue, is situated at the southwest corner of Wabash avenue and 33rd street; that Wabash avenue is a street running north and south in said city; that on the west side of Wabash avenue within two blocks immediately north of said 33rd street there are thirty-eight residences, and no business houses of any sort; that on the east side of said Wabash avenue in the two blocks immediately north of 33rd street there are forty-eight residences and no business houses of any kind or character; that on the east side of Wabash avenue in the two blocks immediately south of 33rd street there are twenty-nine residences and no business

houses of any kind or character; that on the west side of Wabash avenue in the two blocks immediately south of 33rd street, there are thirty-three or more residences, and no business houses of any kind or character, except two stores about two blocks distant from said No. 3300, and situated at the northwest corner of said Wabash avenue and 35th street; that all of said residences above named are very expensive and costly buildings constructed of brick and stone; that property within such four blocks is worth from three to four hundred dollars per front foot, and the location of a saloon at the point designated as 3300 Wabash avenue will greatly depreciate the value of real estate for residence purposes in the vicinity of said proposed saloon, and will greatly decrease the attractiveness of said neighborhood for residence purposes.

"And the respondent says that for these reasons he has considered, and does hereby consider it his duty to refuse said license to said petitioners to keep a saloon at said number."

The relators demurred to the answer, which demurrer was sustained; the respondent stood by his answer.

Whereupon the court ordered a writ in accordance with the prayer of the bill.

WM. G. BEALE, corporation counsel, and GEORGE A. DUPUY, assistant corporation counsel, attorneys for plaintiff in error.

The relator must show a clear right to the writ of mandamus before the same will be granted by the court. *People ex rel. Richberg v. Trustees of Schools*, 86 Ill. 613; *People v. Village of Crotty*, 93 Ill. 186; *County of St. Clair v. People*, 85 Ill. 196; *People v. Lieb*, 85 Ill. 484; *Foos v. Highway Commissioners*, 88 Ill. 142.

The granting of the writ of mandamus is within the sound discretion of the court, and will never be granted to aid a party to violate the law.

It clearly appears that the establishment of the proposed saloon at the location in question would constitute a nuisance.

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A nuisance is anything which worketh hurt, inconvenience or damage to another; as, if one does an act, in itself lawful, which, being done in a particular place, necessarily tends to the damage of another's property, it is a nuisance. *Coker v. Birge*, 9 Ga. 425; *Norcross v. Thoms*, 51 Me. 503, cited in note 1, p. 924, Vol. 16, Am. & Eng. Enc. of Law.

Anything constructed on a person's premises which, of itself or by its intended use, directly injures a neighbor in the proper use and enjoyment of his property is a nuisance. *Grady v. Wolsner*, 46 Ala. 381; *Stone v. Bumpus*, 40 Cal. 428; *Hackney v. State*, 8 Ind. 494; *Knox v. Meyer, etc.*, 55 Barb. (N. Y.) 404.

Any offensive erection which, from its nature, may be an annoyance, and from its situation actually becomes so, is a nuisance. *Taylor's Landlord & Tenant* (5th Ed.), Sec. 201.

A blacksmith's shop may be a public nuisance in certain localities in a city, but not on a side street. *Foucher v. Grass*, 60 Iowa 505; *Whitney v. Bartholomew*, 21 Conn. 213; *Ray v. Lynes*, 10 Ala. 63.

The courts will always consider the convenience of the place in determining whether the act or use of property be a public nuisance. *Tipping v. St. Helen Smelting Co.*, 4 B. & S. 603.

It has been held that a livery stable in a city is not a nuisance *per se*, but if near dwellings it may become one. *Coker v. Birge*, 10 Ga. 336; *Kirkman v. Handy*, 11 Humph. (Tenn.) 406; *Shivery v. Streeper*, 24 Fla. 103; *Rounsaville v. Kohlheim*, 68 Ga. 336.

F. A. BINGHAM, attorney for defendant in error.

The writ of mandamus will issue when the party is entitled to a specific thing and has no other specific remedy by which it may be secured. *People v. Hilliard*, 29 Ill. 413.

The writ lies in all cases where it affords a proper and sufficient remedy for the enforcement of a legal right or an obvious duty, the performance of which involves the exercise of no discretion. *Ohio and Miss. Ry. Co. v. People*, 121 Ill. 483.

Mandamus will issue to compel the doing of a merely ministerial act in the doing of which there is no discretion. *People v. Fletcher*, 2 Scam. 482; *Will County Supervisors v. People*, 110 Ill. 511.

A mandamus will issue in a proper case to compel the issue of a license to keep a dram shop. *Zanone v. Mound City*, 11 Ill. App. 334; 103 Ill. 552; *Kadighn v. Bloomington*, 58 Ill. 229.

The city can not by an ordinance prohibiting the sale of intoxicating liquors without a license, make the issuing of a license discretionary with certain officers; the power can not be so delegated. *East St. Louis v. Wehrung*, 50 Ill. 28.

The ordinance must establish a general rule of which any one may avail on coming within its terms. It must either prohibit or license. *E. St. Louis v. Wehrung*, 50 Ill. 28.

Where the licensing of dram shops is provided for by general ordinance, any proper person is entitled to a license upon compliance with the ordinance and the general law. *Zanone v. Mound City*, 11 Ill. App. 334; 103 Ill. 552; *Chicago v. Rumpff*, 45 Ill. 90; *East St. Louis v. Wider*, 46 Ill. 351; *Same v. Wehrung*, 46 Ill. 392.

The municipal authorities have no power to make any arbitrary discrimination between one proper person and another; the business being recognized by law as legitimate, a license to prosecute must be considered upon the footing of other licenses. *Zanone v. Mound City*, 103 Ill. 552.

A public nuisance is an offense against the public by doing that which is injurious to all the people generally, or by omitting to do that which the common good requires. *Earp v. Lee*, 71 Ill. 193.

An act which the law allows is not a nuisance if done in a proper manner, though damages may be recovered therefor as in certain cases of permanent injury. *Lonfelt v. McGrath*, 33 Ill. App. 158; *City of Chicago and Eastern Ill. Ry. v. Loeb*, 118 Ill. 203.

It is essential to a common nuisance in the keeping of a dram shop that the keeper, or his agent to keep it, intend there to make unlawful sales of intoxicating liquors in violation of law. *Nicholson v. People*, 29 Ill. App. 57.



MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

It is urged, by counsel for the relators, that as the keeping of a saloon is recognized by the law as a legitimate occupation, and the method to be pursued by those desiring to obtain a license to sell liquors is definitely pointed out, when one asking for a license has complied with the law, the authorities have no discretion to refuse because the place where the saloon is to be, is one in which the mayor is of the opinion such a store ought not to be kept.

It is urged that the mayor can not, in his discretion, deprive one neighborhood, or any citizen resident therein, of the right to there have or keep a saloon, while as to other territory he grants all licenses applied for; that the rule and regulation of the public authorities in this regard, must be open, public and alike for all districts, and such as any citizen of good character and sufficient means may comply with.

In support of this proposition, the following citations are made: East St. Louis v. Wehrung, 50 Ill. 28; Zanone v. Mound City, 11 Ill. App. 334; 103 Ill. 552; Chicago v. Rumpff, 45 Ill. 90; East St. Louis v. Wider, 46 Ill. 351.

Most of the foregoing contentions of the relators might be conceded, and yet it not follow that in this cause a writ of mandamus would be issued.

It is seldom that an action can be decided by the consideration of but one principle of law; especially is such the case with regard to the awarding of writs of mandamus.

Although a *prima facie* right to a writ of mandamus be shown, courts still exercise a discretion as to issuing the writ.

Such discretion can not be arbitrary—governed by fancy, caprice or prejudice; it must be a sound discretion, guided by law, legal and regular. The People ex rel. v. Weber, 86 Ill. 283; State v. Anderson County Com'rs, 28 Kans. 67; Alger v. Seaver, 138 Mass. 331; People v. Chapin, 104 N. Y. 96; Proprietors St. Luke's Church v. Slack, 7 Cush. 226; Merrill on Mandamus, Sec. 62.

Tested by these rules, we are to inquire whether we will, by mandamus, compel the mayor to issue a license for a saloon at 3300 Wabash avenue.

Courts can not assume to be more ignorant than the average of the community in which they exercise judicial functions. As individuals, and as judges, we know that many things, legitimate, proper and useful, even indispensable, are nevertheless, at certain places, nuisances.

Blacksmith shops, tanneries, soap factories, even large public schools, are, in a great city at certain places, regarded as nuisances, tending not only to depreciate the value of immediately surrounding property, but destroying the peace and quiet which men seek for and demand at home.

In a great city the useful tendency is to division into districts characterized by marked distinctions as to what is there done.

There are in Chicago large neighborhoods in which no one now thinks of erecting a mere dwelling house, and in which the property owners would unanimously resist an attempt to introduce that peace and quiet which reigns in other quarters.

In a growing city neighborhoods change, and what at one period would be a nuisance, may in time become almost a necessity.

Whether a thing is or is not, at a particular place, a nuisance, is ordinarily a question of fact, and largely a matter of opinion.

That in such a residence neighborhood as 3300 Wabash avenue is described in the answer to be, a saloon is commonly regarded as a nuisance, is a fact of which we are not ignorant. We are therefore confronted with the question of whether we will, by writ of mandamus, compel the public authorities to allow the establishment of a nuisance.

We are asked to establish the principle that the right to keep saloons in any and all quarters of the city, in each block and beside any home, is absolute.

We are not prepared so to do.

The discretion which, in this regard, courts exercise, is

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not arbitrary, controlled by caprice or prejudice; it is based upon the law, is regular and uniform in its operation.

In its effect it is, that a court should not, by mandamus, compel the public officials to issue a license for the keeping of a saloon in a residence neighborhood, where a saloon will be a nuisance.

The order of the Superior Court is reversed.

**J. Engesette v. Donald H. McGilvray.**

1. *CONTRACTS—Declaration that a Party will not Fulfill—Suit.*—Where a contractor, before the day of performance, declares that he will not fulfill, the other party may take him at his word and at once bring suit for a breach of the contract.

*Assumpsit.*—Breach of contract. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 18, 1896.

STATEMENT OF THE CASE.

This appeal comes from a judgment in an action of assumpsit brought to recover the sum of \$500 specified as liquidated damages in a contract made between the parties in the words and figures, as follows:

“For and in consideration of the mutual covenants and agreements entered into by and between D. H. McGilvray, of Harvey, Illinois, and J. Engesette, of DeForest, Wisconsin.

The said parties agree, as follows: McGilvray agrees to sell and deliver to Engesette, on or before August 1, A. D. 1893, all the stock of hardware and tinner's goods that may be in stock at the time of the date and delivery, at the then current wholesale prices as quoted in Chicago, together with the tools on hand, shelving, counters, show cases and to her furniture and fixtures, and a horse and harness and

delivery wagon. If the parties hereto disagree as to the price to be paid for the tools, shelving and counters, show cases and furniture and fixtures, then the matter in dispute to be left to an arbitrator to be selected by each party hereto, and a third arbitrator to be chosen by the first two. McGilvray to keep up the stock and do his best to retain his trade up to the time of transfer.

Said Engesette to give McGilvray twenty days notice before obtaining possession.

The parties hereto mutually agree to forfeit to each other in case of the failure of either party to carry out the agreements herein made the sum of five hundred dollars, which said sum shall be regarded as fixed and liquidated damages to be paid by the party in default.

The said stock and other property herein engaged to be sold to be paid for by said Engesette in cash, on delivery of possession. Each party hereto to share equally in the expense of making invoice.

Executed in duplicate.

Harvey, Illinois, April 20, 1893.

D. H. MCGILVRAY,  
J. ENGESETTE."

"MADISON, WIS., July 10, 1893.

Mr. D. H. McGilvray, Harvey, Ill.

DEAR SIR: I am now on my way to Chicago and expect to be ready for the stock at the time set, August 1, 1893. I will see you in a few days.

Yours truly,  
J. ENGESETTE."

Thus giving McGilvray the twenty days notice specified in the contract.

About July 25, 1893, Engesette went a second time to Harvey, and although he there met McGilvray nothing was said then concerning the contract between them.

On July 29, 1893, Engesette sent one Nordrum to Harvey to tell McGilvray that Engesette would not be ready to take and pay for the stock, etc., on August 1, 1893, and Nordrum went and told McGilvray this.

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At Nordrum's suggestion, McGilvray not having made an invoice or inventory of his stock, etc., Engesette sent a message by telegraph to McGilvray appointing a place of meeting at Nordrum's office, No. 224 South Water street, Chicago, on August 1, 1893, pursuant to which McGilvray and Engesette met at that place on that day and in the presence of Nordrum and one Young. Engesette then and there said that for the reason that his money was tied up in a bank in Wisconsin, which had failed, he was not prepared to take the property. McGilvray urged Engesette to fulfill the contract, and offered to extend the time, or make a new contract, but Engesette declined this, whereupon, and on August 1, 1893, the day of the maturity of the contract (as written, *supra*), McGilvray filed his praecipe and sued out the summons in this suit.

N. M. PLOTKE, attorney for appellant, contended that a plaintiff can not recover for money not due at the institution of the suit. *Hamlin v. Race*, 78 Ill. 422; *Gordon v. Kennedy*, 2 Binn. 287; 1 Chit. Pl. 372; *Cunningham v. Merrell*, 10 J. R. 203; *McClure v. Rush*, 9 Dana 64; *Allen v. Saunders*, 7 B. Mon. 593; *Kettele v. Harvey*, 21 Vermont 301; *Lord v. Belknap*, 1 Cush. 279; *Tompkins v. Elliott*, 5 Wend. 496.

CHAS. P. HUEY, attorney for appellee.

One exercising the power to rescind his contract without right—that is, declaring to the other party his intention not to abide by it, commits thereby a breach, whereon the other may bring an immediate suit, without demanding a performance, which, by the terms of the contract, was to be in the future. *Bishop on Contracts*, Sec. 1428 and cases cited; *Crabtree v. Hagenbush*, 25 Ill. 214; *Selby v. Hutchinson*, 4 Gilm. 319; *Daggett v. Brown*, 28 Ill. 493; *Chairman of Com. v. Sollitt*, 43 Ill. 519; *Lee v. Pennington*, 7 Brad. 251; 86 Ill. 14.

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MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Appellant having given notice that he would not fulfill his contract, appellee was not bound to do a vain and useless thing, *i. e.*, prepare an inventory and tender the goods.

Where a contractor, before the day of performance, declares that he will not fulfill, the other party may take him at his word and at once bring suit for a breach of contract. Fox v. Kitton, 19 Ill. 519; Chitty on Contracts, Vol. 2, p. 1067; Hochester v. De La Tour, 20 Eng. Law & Eq. 157; Lee v. Pennington, 7 Ill. App. 247.

The judgment of the Circuit Court is affirmed.

63	464
66	373
68	464
79	579

### Chicago General Ry. Co. v. West Chicago St. R. R. Co.

1. STREET RAILWAYS—*Property Entitled to Protection.*—Property in street railways is entitled to protection against wrongdoing to the same extent as other property.

2. SAME—*Privilege of Laying Tracks in Public Streets.*—The privilege of laying tracks in public streets is given to street railway companies for the accommodation and benefit of the public and their undertaking to serve it.

3. SAME—*Two Companies in the Same Street.*—Where there has been given to two companies the right to place rails in and use the same street, each is bound to place its rails and to use the street in such manner that the public may have the benefit which can be derived from such joint use. Neither can be permitted to unnecessarily interfere with the right of the other.

4. SAME—*Joint Use of Street.*—Where two companies jointly occupy a street, each one is bound to exercise its right to place and maintain its tracks in such a manner that the same shall be an accommodation to the public, and shall not unnecessarily interfere with its right of passage.

**Bill for Relief.**—Error to the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the March term, 1896. Reversed and remanded, with directions. Opinion filed April 13, 1896.

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C. C. & C. L. BONNEY and LYMAN M. PAINE, attorneys for plaintiff in error.

The right, in consideration of services rendered the public, to lay tracks in a public street, and to operate cars thereon, is a valuable property, and is therefore a property right.

Being property, if it is to be taken for the public use, its owners are entitled to just compensation, and that compensation, it would seem, must be ascertained by a jury. *P. P. & J. Ry. v. P. & S. Ry.*, 66 Ill. 174; *Central Ry. Co. v. Fort Clark Ry.*, 81 Ill. 523; *C. R. & P. Ry. v. Town of Lake*, 71 Ill. 333; *C. L. & C. Ry. v. D. & V. Ry.*, 75 Ill. 113; *Metropolitan Ry. v. Chicago W. D. Ry.*, 87 Ill. 317; *C. & N. W. Ry. v. C. & E. Ry.*, 112 Ill. 589.

Injunction is the proper remedy to restrain the taking of property where just compensation has not been first fixed by a jury and paid according to law. *Hickey v. C. & W. I. Ry.*, 6 Ill. App. 172; *Cobb v. I. & St. L. Ry.*, 68 Ill. 233; *Snell v. Buresh*, 123 Ill. 151; *Field v. Barling*, 149 Ill. 556; *Zearing v. Raber*, 74 Ill. 409; *Princeville v. Auten*, 77 Ill. 325; *Earll v. Chicago*, 136 Ill. 277; *Bez v. C., R. I. & P. Ry.*, 23 Ill. App. 137; *Carter v. Chicago*, 57 Ill. 233.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for defendant in error.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The melodious alliteration by which the brief of the plaintiff in error characterizes the defendant in error as a "midnight marauder," is, as Pecksniff said about getting drunk—"very soothing."

The bill to which the Circuit Court sustained a demurrer, and dismissed, is as follows:

"Humbly complaining, sheweth unto your honors your orator, the Chicago General Railway Company, that heretofore, to wit, on or about October 21, A. D. 1893, your orator was duly incorporated under the so-called general

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railway laws of said State of Illinois, to construct certain lines of railway, described in its articles of incorporation, and to acquire, purchase, lease, maintain, and operate any railway or railways or portions thereof which may exist or be constructed upon or along the line described in said articles of incorporation, or any of them, one of which said lines was and is along the public highway, in the city of Chicago, in the county of Cook, State of Illinois, known and described as West Twenty-second street, including that part of said Twenty-second street which is located between the Chicago river on the east and Crawford avenue on the west, as is more definitely shown on a map or plat attached hereto and marked 'Exhibit A,' and made a part hereof; and that the part of said street which is particularly involved in the controversy, in respect whereof this bill of complaint is filed, is near Crawford avenue, as is more definitely shown on a map attached hereto, and made a part hereof, and marked 'Exhibit B.'

A copy of the articles of incorporation of your orator is hereto annexed, and made a part hereof, for such reference as occasion may from time to time require, and is marked 'Exhibit C.'

And your orator further shows unto your honors, that the West and South Towns Street Railway Company is a corporation which was duly organized under the laws of this State, on or about August 7, A. D. 1891, under the name of the West and South Towns Horse Railway Company, which name was afterward, to wit, on or about March 23, A. D. 1892, changed in due form of law to the West and South Towns Street Railway Company, for the construction and operation of a horse, electric or cable dummy railroad, on any or all such streets within the present or future limits of the city of Chicago, as might be granted to it by the city council of said city, and particularly for the construction of such railway along said Twenty-second street, including that part of said street located between the Chicago river and Crawford avenue, as aforesaid.

A copy of the articles of incorporation of the said West



and South Towns Street Railway Company is hereby annexed and made a part hereof, for such reference as occasion may from time to time require, and is marked 'Exhibit D.' And your orator further shows unto your honors that on or about February 8, 1892, the city council of the said city of Chicago, duly passed an ordinance which is still in full force and effect, wherein and whereby the said city council granted to the said West and South Towns Street Railway Company, its successors and assigns, consent, permission and authority to lay down, construct, operate and maintain a single or double track street railway, with all necessary and convenient turn-outs, turn-tables, side tracks, connections and switches, in, upon, over and along certain portions of streets, alleys, blocks or grounds in the city of Chicago, including the right to cross all connecting, abutting and intersecting streets, avenues, courts, places, alleys and public highways, including that portion of said Twenty-second street above described as located between said Chicago river and said Crawford avenue.

A copy of said ordinance is hereto annexed and made part hereof, for such reference as occasion may from time to time require, and is marked 'Exhibit E.'

And your orator further shows unto your honors that having obtained the proper permit therefor from the commissioner of public works of the said city of Chicago, said West and South Towns Street Railway Company proceeded to locate and fix its right of way for its said railway from said Chicago river to said Crawford avenue on each side of the center line of said Twenty-second street; that is to say to locate one track of its said railway on the north side of said center line and the other track of its said railway on the south side of said center line, and thereupon proceeded to construct, equip and put in operation the railway track located on the north side of the center line from said Chicago river to said Crawford avenue, and also proceeded to construct, equip and put in operation the railway track so located on the south of the said center line, except about fifteen hundred (1500) feet thereof near said Crawford avenue.

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And your orator also shows that the length of double track so constructed and operated from said river to said Crawford avenue is about four miles and one half a mile. And your orator also shows that said location of said line and the construction thereof as aforesaid, was had and made by and with the concurrence of the department of public works of the said city of Chicago, under and in compliance with said permit and ordinance, and that the operation of said railway tracks has been and still is continued by your orator under the lease hereinafter set forth; and that your orator has been and still is intending, as the lessee of said West and South Towns Street Railway Company, to proceed as speedily as circumstances may allow and complete and put in operation said fifteen hundred (1500) feet of said southerly line of its track as authorized by said ordinance and said permit.

And your orator also shows that the completion of said southerly track of said railway as above described is necessary to complete the double track railway authorized by law, and the ordinances of said city, and demanded by the necessities of the traveling public, from the south branch of the Chicago river in said city westerly to said Crawford avenue; and that the intervening space, over which your orator desires and has the right to build said southerly track is about fifteen hundred (1500) feet in length, as aforesaid.

And your orator further shows unto your honors, that on or about April 3, 1894, your orator, as it lawfully might do under the laws of this State, obtained and acquired by lease from the said West and South Towns Street Railway Company, all and singular the railways of said company, including particularly its line of railway on said Twenty-second street in said city of Chicago; together with all and singular the rights, privileges and licenses granted by the city council of said city of Chicago to said West and South Towns Street Railway Company to lay down, construct and operate such railways in certain streets of said city, including that part of said Twenty-second street above

described, as located between said Chicago river and said Crawford avenue. And thereupon your orator entered into possession, under said lease, of all and singular the railway lines, property, rights and privileges aforesaid, and has ever since been, and still is engaged in the construction and operation of said lines of railway in conformity to the laws of this State and the ordinances of the city of Chicago.

And your orator further shows that it has caused a correct plat of a portion of said Twenty-second street, to be made, which said plat correctly shows said Twenty-second street from the west line of Crawford avenue, to a point east of the easterly line of Ogden avenue, where said easterly line of Ogden avenue intersects with the north line of said Twenty-second street, and which plat shows the place of the location and construction of the north track of the Chicago General Railway Company; the place of location and construction of the north trolley wire of the Chicago General Railway Company; the place of location and construction of the south trolley wire of the Chicago General Railway Company over the location of the unconstructed fifteen hundred feet of the south track of your orator's railway; the place of the location and construction of a portion of the south track of the Chicago General Railway Company constructed across Crawford avenue; the Ogden avenue electric line of the West Chicago Street Railroad Company, and the one hundred and eighty (180) feet of the new tracks, laid by the West Chicago Street Railroad Company in, upon and along the south half of the easement of the Chicago General Railway Company, and on the line of the south track thereof, and under the south trolley wire of said Chicago General Railway Company, which said plat is hereto attached and made a part hereof, and marked 'Exhibit B.'

And your orator further shows that the line of said south track of its said railway is located and established by your orator and said city of Chicago so that the northerly rail of so much of said south track as has been constructed is,

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and of so much of said northerly rail as is to be constructed will be, situated two (2) feet and five (5) inches south of the center line of Twenty-second street, and that the southerly rail of so much of said south track as has been constructed is, and of so much of said southerly track as is to be constructed will be, four (4) feet and eight and a half (8½) inches south of said northerly rail of said south track.

And your orator further shows unto your honors that the West Chicago Street Railroad Company, which is a corporation duly organized under the laws of the said State of Illinois, and is engaged in the operation of certain lines of street railway in the West Division of said city, has no right or authority, under or by virtue of any law of this State, or under or by virtue of any ordinance of said city of Chicago, or any permit in writing from the commissioner of public works of said city of Chicago, or otherwise, to occupy, use, or lay down or construct any railway track longitudinally within any portion of said Twenty-second street which is located between said Chicago river and said Crawford avenue, as aforesaid. Nevertheless, the said West Chicago Street Railroad Company, in violation of law and the rights of your orator, and without having given any notice or taken any proceedings by condemnation, purchase, lease, or otherwise, to acquire any right so to do, entered upon the right of way of your orator along said part of said Twenty-second street and took possession of a part of the south half thereof between the disconnected ends of the south track of your orator's railway, the location of which more fully appears by reference to Exhibit B aforesaid, said part of said south half of said right of way being the portion thereof within which your orator has not yet completed the construction of said second railway track; and thereupon said West Chicago Street Railroad Company, without any such notice, consent, or authority, has already actually constructed, and laid down, longitudinally upon said right of way in said Twenty-second street, a railway track consisting of rails, switching frogs, ties and other appurtenances for about one hundred and eighty (180) feet; that the north

rail of said railway track is located and constructed two (2) feet and five (5) inches south of the center line of said Twenty-second street, and that the southerly rail of said railway track is located and constructed four (4) feet and eight and a half ( $8\frac{1}{2}$ ) inches south of the north rail of said railway track, and that the said West Chicago Street Railroad Company has constructed and is proceeding to construct in connection with said railway track seven (7) switching tracks so-called, whereby the said West Chicago Street Railroad Company has actually entered upon and confiscated a portion of said right of way of your orators in such a manner, and to such an extent, as will, if permitted to continue, wholly prevent the completion of said southerly track of your orator's said railway so authorized and located as aforesaid.

And your orator further shows unto your honors, that the said West Chicago Street Railroad Company has in no manner acquired any lawful right or authority to use or occupy any part of said Twenty-second street, but without having obtained therefor any petition of property owners whatever, and without having procured therefor any ordinance whatever of the city council of said city of Chicago, purporting to give any authority so to do, and without having obtained therefor any consent from your orator, and without having acquired any right so to do by any proceeding under the law of eminent domain of this State, or in any other manner whatever, the said West Chicago Street Railroad Company, well knowing the premises, nevertheless unlawfully and improperly procured the issue of a certain pretended permit, signed, not by the commissioner of public works, but by an alleged assistant superintendent of streets, who had no power or authority to issue any such permit, and under color of the same entered upon your orator's said right of way and proceeded to occupy and use the same in manner aforesaid.

And your orator further shows that at the time of the filing of this bill of complaint, and for five years last past, the general ordinances of the city of Chicago relating to the

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laying of tracks within the streets, and the securing of a permit therefor, were and are as follows:

2089. **TRACK-LAYING—PERMIT A PREREQUISITE.** Be it ordained by the city council of the city of Chicago. Sec. 1. Hereafter it shall not be lawful for any person or corporation to lay any railroad track or tracks in or upon any of the streets, avenues, alleys or other public places within the city of Chicago, without first procuring a permit, in writing, therefor, from the commissioner of public works.

2090. **PERMIT—HOW ISSUED—CONTENTS—FEE.** Par. 2. Such permit shall be issued by the commissioner of public works in accordance with the terms of the respective ordinances under which the said tracks may be authorized to be laid, and shall specify in full the terms and conditions under which the same shall be constructed. For every such permit there shall be paid to the city the cost of issuing the same and the expense of causing the construction under said permit, to be superintended by the department of public works.

2091. **PENAL CLAUSE.** Par. 3. Any person or corporation laying any track or tracks in violation of this ordinance, or without complying with the terms of the permit herein required, shall be subject to a fine of not less than one hundred dollars nor more than two hundred dollars, and to a further fine of one hundred dollars a day for every day any such track or tracks shall remain in any such street, avenue, alley, or other public place, where the same shall have been laid without said permit or in violation of the terms thereof.

And your orator further shows unto your honors that before the filing of this bill it caused application to be made to said West Chicago Street Railroad Company to desist from its aforesaid wrongful encroachment upon the right of way, franchises, privileges, licenses and property of your orator, and to remove said track from said right of way; and also caused notice to be given to West Chicago Street Railroad Company that your orator desires forthwith to

proceed with the building and construction of said second track along the southerly half of its said right of way, but said West Chicago Street Railroad Company wholly neglected and refused so to remove its said track and cease the obstruction, occupancy and use thereby caused of the right of way of your orator.

And your orator further shows unto your honors that it has also caused application to be made to the department of public works of the said city of Chicago, for information of the right or pretense under which said pretended permit was issued to said West Chicago Street Railroad Company; and your orator thereupon demanded of said department that said pretended permit be wholly revoked and annulled and that said department do take immediate measures to cause the removal of said track from the right of way of your orator, but said department of public works did not nor would in anywise comply with that request of your orator, but wholly neglected and refused so to do.

Wherefore, and because your orator is without remedy by the strict rules of the common law, and can only obtain adequate relief in this honorable court of equity, it prays that said West Chicago Street Railroad Company may be duly summoned to appear and answer this bill of complaint, and all and singular the matters and things herein contained, but not under oath or seal, its answer under such oath and seal being hereby expressly waived.

And your orator further prays that upon the hearing of this cause, it may be ordered, adjudged and decreed by the court that said pretended permit to said West Chicago Street Railroad Company was and is wholly void and of no force and effect; and that the said West Chicago Street Railroad Company has not any right or authority to enter upon, use or occupy any part of the right of way so as aforesaid granted to your orator; and said West Chicago Street Railroad Company has not any right or authority to lay down any such track as has been constructed by it upon said right of way of your orator; and that said West Chicago Street Railroad Company shall, within some short time, to be fixed

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by the court, wholly take up and remove its said track from the right of way of your orator; and that said West Chicago Street Railroad Company do also wholly desist and abstain from all and any future obstruction or any interference with your orator's said right of way, and the construction of its said railway tracks, and the transportation of passengers in railway cars thereon.

And your orator further prays that if occasion shall require at any time during the pendency of this suit, or at the conclusion of the same, your orator may have and obtain, upon the proper application, the proper order and writ of injunction to enjoin and restrain the said West Chicago Street Railroad Company from its aforesaid encroachment upon the right of way of your orator; and that your orator may have all such further or other relief, as the nature of the case may require and equity and good conscience approve," etc.

The plat, "Exhibit B," attached to the bill, shows what the bill states that it shows.

This is not a case in which the court is asked to enjoin or remove additional facilities for travel in a street, but to remove impediments to travel. If the bill be true, the plaintiff in error had the right to continue its double track upon the street — a right which the defendant in error has, without right, at least seriously impaired.

Property in a street railway is entitled to protection against wrong doing to the same extent as other property. *Central City Ry. v. Ft. Clark Ry.*, 81 Ill. 523.

One hundred and eighty feet of track, connecting with nothing at either end, does not come within the principle of *Phelps v. Lake Street Elevated R. R.*, 60 Ill. App. 471.

The demurrer was wrongly sustained. On the face of the bill the acts of the defendant in error would seem to have been for the purpose of preventing the plaintiff in error from the exercise of its rights.

The decree sustaining the demurrer and dismissing the bill is reversed, and the cause remanded, with directions to overrule the demurrer.



National Brewing Co. v. Ahlgren.

MR. JUSTICE WATERMAN.

Neither of the contending street railways have, merely for their own accommodation, profit or pleasure, any right to lay tracks in the public streets. The privilege in this regard given to them is for the accommodation and benefit of the public, and their undertaking to serve it.

Each corporation is bound to exercise its right to place and maintain railway tracks in such manner that the same shall be an accommodation to the public, and shall not unnecessarily interfere with its right of passage.

Where there has been given to two corporations the right to place rails in and use the same street, each is bound to place its rails and use the street in such manner that the public may have the benefit which can be derived from such joint use.

Neither can be permitted to unnecessarily interfere with the right of the other.

National Brewing Co. v. O. H. Ahlgren.

1. **RATIFICATION—By Corporations.**—Ratification by a corporation of a contract made in its name, whether sealed with its corporate seal or not, will be implied by the acts of the corporation, and will be inferred from facts and circumstances as in the cases of individuals.

2. **ULTRA VIRES—Estoppel to Assert.**—Where a corporation enters into a contract in excess of its powers, but enjoys its benefits, it will be estopped to appeal to the limitations imposed by its charter for the purpose of escaping payment of the stipulated consideration.

3. **SAME—What is Not.**—The renting of premises to be used as a beer saloon, is not in excess of the corporate powers of the National Brewing Company, as expressed in its articles of incorporation, "to engage in the manufacture and sale of lager beer and other fermented liquors, and malting."

**Action for Rent.**—Appeal from the Circuit Court of Cook County: the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 18, 1891.

KNIGHT & BROWN, attorneys for appellant.

The term *ultra vires* denotes those acts of a corporation

63	475
64	24*
63	475
66	273
66	535
63	475
80	353
80	475
82	349
82	351

which are outside the objects for which the corporation was created, as defined in the object of its corporation, and therefore beyond the power conferred upon it by the legislature. 27 A. & E. Enc. of Law, 353; *Filon v. Miller Brewing Co.*, 15 N. Y. Sup. 57.

The contract, as executed by the secretary, was not within the scope of the business for which the defendant was organized, and the plaintiffs were chargeable with knowledge of the limitation of the defendant's powers. *National Park Bank v. German-American Mut. W. & S. Co.*, 116 N. Y. 281; 22 N. E. Rep. 567; *Jennison v. Bank*, 122 N. Y. 135; 25 N. E. Rep. 264.

A corporation can not appropriate to itself property and then escape payment therefor under the plea of *ultra vires*, but we state it as a principle that, where an *ultra vires* contract is executory it will never be enforced. 27 A. & E. Enc. of Law, 361.

A continuing contract is an executory contract in respect to the future and future performance, and a lease is a continuing or executory contract in respect to the unexpired term. 27 A. & E. Enc. of Law, 362-368.

L. C. COOPER, attorney for appellee.

A seal is not essential to the validity of a contract, such as the one in this case.

The statute of frauds does not require it as between individuals in a case like this, and under our decisions corporations act simply as individuals. *Green v. Blodgett*, 55 Ill. App. 563.

Leasing of the premises was within the scope of its authority and within the scope of its managing officer's authority; therefore the defense of *ultra vires* has no foundation in the evidence in this case. *National Bank of Monmouth v. Brooks*, 22 Ill. App. 238, and cases cited.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was an action brought by the appellee against the

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National Brewing Co. v. Ahlgren.

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appellant to recover for one month's rent for certain premises demised by the appellee for a term from April 1, 1891, to April 1, 1892, at a monthly rental of \$200.

The suit was begun before a justice of the peace, and upon appeal to the Circuit Court was there heard by the court without a jury.

Twenty-five separate propositions of law were presented to the court by the appellant, thirteen of which were held, and two others held as modified, and ten were refused.

It would magnify the questions presented by such propositions into undue importance to discuss them in detail. Suffice it to say, that the law applicable to the case was properly held, and that no error was committed in the refusal of either of the ten rejected propositions.

The lease itself was introduced in evidence, and purported to be a lease from the appellee to "the National Brewing Company," in the usual form; and concluded: "In witness whereof the said parties have hereunto set their hands and seals, the day and year first above written," and was signed and sealed as follows:

"OLAF H. AHLGREN, [SEAL.]

NATIONAL BREWING COMPANY, [SEAL.]

J. B. RALSTON,

President."

In *N. W. Distilling Co. v. Brant*, 69 Ill. 658, the corporation in that case was held bound in an action of covenant upon a lease which, in the naming of the parties to it, was much less certain, although in form of signature substantially the same as this.

It was admitted that the appellant entered into possession of the demised premises, and fitted up the saloon for the sale of its "brew;" and the evidence was uncontradicted that appellant continued in occupancy and paid the rent monthly for about three years of the term.

To most of the questions argued by counsel, we regard a sufficient answer to be found in the single fact of ratification by the appellant, as evidenced by occupancy and payment of rent for three years.

Ratification by a corporation of a contract made in its name, whether sealed with its corporate seal or not, will be implied by the acts of the corporation, and will be inferred from facts and circumstances, like in the cases of individuals. *L. N. A. & C. Ry. Co. v. Carson*, 51 Ill. App. 552; same case, 151 Ill. 444.

There is no such charm in the fact of incorporation as will operate to exempt corporations from well established legal inferences which follow upon the acts of ordinary persons.

We do not think that the renting of premises to be used as a beer saloon, either wholly or in part, was in excess of the corporate powers of the appellant, which was organized, as expressed in its articles of incorporation, "to engage in the manufacture and sale of lager beer and other fermented liquors, and malting." *Richelieu Hotel Co. v. Mil. En. Co.*, 140 Ill. 248; *Green v. Blodgett*, 55 Ill. App. 556. But we need not so decide, for under the facts of this case the defense of *ultra vires* can not avail the appellant. As said in *Heims Brewing Co. v. Flannery*, 137 Ill. 309 :

"Even admitting that entering into said contract was in excess of the defendant's corporate powers, yet having entered into said contract and enjoyed its benefits, it should be estopped to appeal to the limitations imposed by its charter, for the purpose of escaping payment of the stipulated consideration." See also *N. W. Brewing Co. v. Manion*, 44 Ill. 434; *First Nat. Bank of Monmouth v. Brooks*, 22 Ill. App. 238; and *Kadish v. Garden City Bldg. Ass'n*, 47 Ill. App. 502, and *ultra vires* cases there cited on page 609.

Further allusion to the points made by appellant would only serve to bring us back to the questions we have mentioned, and is unnecessary.

The judgment, upon both meritorious and strictly legal grounds, should be affirmed, and it is so ordered.

**Adams & Sons Co. v. Morris H. Ellinger.**

1. **ABSTRACTS—***When Insufficient, Judgment Affirmed.*—Where the abstract fails to show that any judgment was entered, or bill of exceptions made, the judgment will be affirmed.

**Assumpsit**, for money due. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 18, 1896.

BYAM & WEINSCHENK, attorneys for appellant.

ZACH. HOFHEIMER, attorney for appellee.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The abstract of the appellant labels this case as appeal, and itself—a corporation—plaintiff in error; does not show that any judgment was ever entered, or any bill of exceptions made. If upon such an abstract we went into the merits so far as they were shown, it would appear that the appellant promised to pay the appellee one thousand dollars for doing what he did do, and when it was done, would not pay anything.

In such a case, the judgment—if there be one, as the briefs assume—should be affirmed, and it is accordingly done.

No fault can be found in the instructions which the abstract says were given for the appellee, and all that the appellant asked were given, except one—to find for the defendant.

The case was fully proved, and the result was right. Affirmed.

**Illinois Watch Company v. National Manufacturing and  
Importing Company, Insolvent, Charles H.  
Fuller, Assignee.**

1. **VOLUNTARY ASSIGNMENTS — *Publication of Notice.***—Section 2, chapter 10a, R. S., entitled, "Assignments," providing that notice to creditors to present claims shall be given by publication in some newspaper published in the county, etc., and which publication shall continue at least six weeks, is met by a notice having been published for six successive weeks.

2. **SAME—*Sufficiency of Publication.***—A notice under section 2, chapter 10a, R. S., entitled "Assignments," published the first time on the day it is dated and being published "six successive weeks, to wit, six times," is the same as to say that it was published once in each week for six successive weeks, which is all the statute contemplates.

**Proceedings in Voluntary Assignments.**—Appeal from the County Court of Cook County; the Hon. ORRIN H. CARTER, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 13, 1896.

J. WARREN PEASE, attorney for appellant, contended that the provisions of the statute relating to notice have not been complied with and no jurisdiction obtained of the creditor.

The acquirement of jurisdiction of a person is an act required to be performed in strict accordance with the statute conferring the right or it is null and void. *Campbell v. McCahan*, 41 Ill. 49; *Hartung v. Hartung*, 8 Brad. 159; *Rietz v. People*, 77 Ill. 518; *McDermaid et al. v. Russell*, 41 Ill. 490; *Hogden v. Guttery*, 58 Ill. 436; *McDaniel v. Correll*, 19 Ill. 226; *Union National Bank v. Doane*, 140 Ill. 196; *Ward v. Durham*, 134 Ill. 200.

SMITH, SHEDD & UNDERWOOD, attorneys for appellee, contended that the purpose of the notices is to give information on which creditors may act if they desire, and a creditor who receives actual notice by mail in apt time is not entitled to object to the notice by publication. *Suppiger v. Seybt*, 23 Ill. App. 468.

The publication of the notice was sufficient under the statute. *Madden v. Cooper*, 47 Ill. 359; *Ricketts v. Hyde Park*, 85 Ill. 110; *Andrews v. People*, 83 Ill. 529; *Pearson v. Brodley*, 48 Ill. 250; *Knowlton v. Knowlton*, 155 Ill. 158.

MR. JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

Section 2, Chap. 10a, Rev. Stat., entitled "Assignments for Benefit of Creditors," provides that notice to creditors to present claims, shall be given by the assignee, "by publication in some newspaper published in the county, if any, and if none, then in the nearest county thereto, which publication shall be continued at least six weeks," etc.

The notice in this case was published "for six successive weeks, to wit: Six times in the Chicago Daily Law Bulletin, a public daily newspaper, \* \* \* and that the date of the first paper containing the same was the 24th day of April, A. D. 1895, and that the date of the last paper containing same was the 29th day of May, A. D. 1895," etc.

The notice bore date April 24, 1895, and was for creditors to present their claims within three months from that date.

The whole case turns upon whether the notice as so published was in compliance with the statute.

It is urged that the notice so published ceased at the end of five weeks and one day, and therefore was not in accordance with the statute; and that a further inference against the sufficiency of the publication is to be drawn from the fact that the publication was made in a daily paper.

The language of the statute is that the "publication shall be continued six weeks."

There are numerous decisions of the Supreme Court which, by analogy, should control us in holding the publication to have been a sufficient compliance with the statute. *Knowlton v. Knowlton*, 155 Ill. 158; *Ricketts v. Hyde Park*, 85 Ill. 110; *Andrews v. People*, 83 Ill. 529; *Pearson v. Pearson*, 48 Ill. 250; *Madden v. Cooper*, 47 Ill. 359.

The requirement that the publication shall be "continued

six weeks," is met by the notice having been published for six successive weeks.

The notice was published the first time on the day it was dated, and being published six successive weeks, to wit, six times, is the same as to say that it was published once in each week for six successive weeks, which is all that the statute contemplates.

So holding, seems to leave nothing else in the record that requires discussion, and the judgment of the County Court is affirmed.

63	482
66	685
68	482
70	388

### Samuel Richardson v. Thomas Cassidy.

1. **REPLEVIN**—*Where it Lies*.—Replevin lies only against one from whose possession the sheriff can take the property, and to whose possession it can be returned if a return is awarded.

2. **SAME**—*After a Forthcoming Bond is Given*.—The lien of an execution remains upon personal property levied upon and retained by the defendant under a forthcoming bond but replevin does not lie against the officer holding the execution after the bond is taken.

3. **ABSTRACTS**—*No Fees Where the Whole Record is Printed*.—When the appellant prints the whole record instead of making and printing an abstract he will be allowed no fees for printing it.

**Replevin**.—Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the March term, 1896. Reversed and remanded. Opinion filed April 18, 1896.

WILLIAM E. O'NEILL, attorney for appellant.

The action of replevin will not lie against one who has come into the lawful possession of chattels if he has any equitable or legal lien to the same, or where he has not actual or constructive possession of the same. Cobbey on Replevin, page 30, Sec. 51; Ramsdal v. Buswell, 54 Me. 546; Byron v. Crippen, 4 Gray (Mass.) 312; Newhall v. Dunlap, 14 Me. 180; 31 Am. Dec. 45; Hoover v. Hays, 10 B. Mon. (Ky.) 72; 31 Am. Dec. 540.



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Richardson v. Cassidy.

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Replevin does not lie unless there has been an unlawful taking from the possession of another. Cobbey on Replevin, Sec. 55; Meany v. Head, 1 Mass. 319.

To enable plaintiff to maintain an action for the recovery of specific personal property, the defendant must be in possession thereof at the commencement of the action. Where the petition alleges that the defendant is in possession, and the proof shows the contrary, there is such variance between the allegation and the proof as disables plaintiff from recovering. Cobbey on Replevin, Sec. 61; Hager v. Marcus, 5 Mo. App. 565; Crawford v. Wright, 5 Mo. 577; Johnson v. Garlick, 25 Wis. 705; Coffin v. Gebhart, 18 Ia. 257; Houghten v. Newberry, 69 N. Car. 456; Hall v. White, 106 Mass. 599.

KAVANAGH & O'DONNELL, attorneys for appellee.

Where there are two copies of the record, one printed and one written, the court will not dig through the entire record to find the facts. Flory v. Brown, 37 Ill. App. 270; Lake v. Lower, 30 Id. 500; People v. Auperger, 23 Id. 450.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee commenced an action of replevin against several persons, among whom was the appellant, who alone put in pleas, and his pleas were *non cepit*, *non detinet*, and a plea stating circumstances specially, which, in effect, amounted to both the other pleas.

He never had possession of the property. His only interest in it, so far as this record shows, is that he had loaned some money and taken as security therefor, by indorsement, a warehouse receipt issued to the person to whom the money was loaned.

There was some testimony that he did offer to sell the property, to be taken out of town, the tendency of which was to show a bad intent on his part, but none that he had ever meddled with the custody or control of the property itself. On his pleas, therefore, the verdict should have been

in his favor, which would have left the property in the possession of the appellee, it having been delivered to him under the replevin writ. *Mattson v. Hanisch*, 5 Ill. App. 102.

The appellant was not liable to be sued in replevin, which lies only against one from whose possession the sheriff can take the property, and to whose possession it can be returned, if a return is awarded. *Ide v. Gilbert*, 62 Ill. App. 524; *Blatchford v. Boyden*, 18 Ill. App. 378; *Boyden v. Frank*, 20 Ill. App. 169; *Hall v. White*, 106 Mass. 599.

Though the lien of an execution remains upon personal property levied upon and retained by the defendant in the execution under a forthcoming bond (*Brush v. Seguin*, 24 Ill. 254), yet the officer holding the execution can not, after the bond is taken, be sued in replevin. *Gaff v. Harding*, 48 Ill. 148.

The case does not show that the appellant ever put any impediment in the way of the appellee reclaiming his property, or made any attempt to prevent him from keeping it after he got it.

The judgment is reversed and the cause remanded.

The appellant having printed the whole record, instead of making and printing an abstract, will be allowed no costs for printing it. *Kelly v. Kellogg*, 79 Ill. 477. Reversed and remanded.

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### S. P. Ruble v. R. W. Coulter.

1. *ASSIGNMENT—As Security, When at an End.*—An assignment of a contract to a person for the purpose of indemnifying him against loss in signing a note as security for the assignor, is at an end when the assignor pays the indebtedness and his rights may then be resumed.

**Bill of Interpleader.**—Appeal from the Superior Court of Cook County; the Hon. JAMES GOGGIN, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 13, 1896.

## STATEMENT OF THE CASE.

This was an attachment suit brought by R. W. Coulter, in March, 1890, against Martin R. Ruble. The Cold Blast Feather Company and others were served as garnishees. The Cold Blast Feather Company answered that it entered into a certain contract with said Martin R. Ruble on the 16th day of February, A. D. 1885, and by virtue of said contract certain royalties had accrued, and that at the time of its last answer there was in its possession \$1,791.25, which amount had accrued as royalties under said contract. Said garnishee further answered that it had been advised and believed that this money belonged to one S. P. Ruble, the appellant. S. P. Ruble, appellant, filed an interplea May 25, 1891, alleging that Martin R. Ruble did, on the 3d day of February, 1888, by his assignment in writing of that day, set over to him, S. P. Ruble, all the right, title and interest in and to the contract between Martin R. Ruble and the Cold Blast Feather Company, and that he, S. P. Ruble, was entitled to all royalties that had accrued by virtue of said contract and especially to any funds referred to in the answer of the Cold Blast Feather Company, and that Martin R. Ruble had no right whatsoever thereto. No answer or reply was ever made to the interplea of S. P. Ruble.

On April 4, 1895, S. P. Ruble filed an amendment to his interplea, and on the same date the court entered an order requiring the plaintiff to reply thereto within five days. No reply, however, was made thereto within the five days, but on April 17, 1895, the plaintiff, without leave of court, filed a traverse to said amendment. On the trial of the case, the interpleader (appellant in this court), offered in evidence the contract between said interpleader and Martin R. Ruble, purporting to assign to said interpleader all interest in and to the contract between Martin R. Ruble and the Cold Blast Feather Company, and the only objection made by the plaintiff to its introduction in evidence, was, that it was incompetent because it was not attached to the contract of

which it purported to be an assignment. The contract, however, was admitted in evidence by the court.

The interpleader further offered to show that he had paid the note referred to in said contract, and that he had paid other moneys for and on behalf and at the request of said Martin R. Ruble, the consideration for the payment of the same being that said interpleader should have all moneys accruing as royalties in the hands of the Cold Blast Feather Company by virtue of the contract between Martin R. Ruble and the Cold Blast Feather Company.

The interpleader further offered to prove that notice was given to the said Cold Blast Feather Company of said assignment, and that said Cold Blast Feather Company had promised to pay to him said royalties, and did in fact account to and pay to him said royalties up to within a short time before the service of the writ upon said garnishee.

The assignment was as follows :

" This agreement, entered into this twenty-first day of April, 1887, by and between Martin R. Ruble and Samuel P. Ruble, witnesseth :

That in consideration of said Samuel P. Ruble having this day become surety on a certain note for said Martin R. Ruble, this day given by said Martin R. Ruble to Charles Graeter, of the city of Vincennes, Indiana, for the sum of seven hundred and fifty (750) dollars, payable eight (8) months after date, at the Vincennes National Bank, with eight per cent interest after date until paid, and attorney's fees, without relief from valuation or appraisement laws, the said Martin R. Ruble does hereby assign, set over and deliver unto said Samuel P. Ruble all the right, title and interest of said Martin R. Ruble in and to a certain contract, executed on the 16th day of February, 1885, by and between said Martin R. Ruble and the ' Cold Blast Feather Company,' of Chicago, Illinois, to have and to hold the same for his, Samuel P. Ruble's, own use and behoof forever, and especially in the event that he, the said Samuel P. Ruble, shall pay, or shall have to pay, said note or any part thereof as such surety. In case said Martin R. Ruble shall well and truly pay said note at maturity thereof, then said Samule

Schmidt v. Keeler.

P. Ruble shall deliver said contract to said Martin R. Ruble, and shall forfeit all right to any of the proceeds thereof.

Witness our hands the day and year aforesaid.

MARTIN R. RUBLE.  
S. P. RUBLE."

The jury found the issues against the interpleader, judgment was entered upon such finding, and this appeal is prosecuted therefrom.

HARRY D. IRWIN, attorney for appellant.

JAMES A. FULLENWIDER, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The assignment of the contract of the Cold Blast Feather Company to S. P. Ruble, was to indemnify him for signing a note for \$750. It appears that he has received from the Cold Blast Feather Company by reason of such assignment, \$1,334.09.

As the assignment was to be at an end and the rights of the assignor to be resumed when the assignor paid said note, the jury were warranted in finding that the assignment, when such payment of \$1,334.09 had been made, was at an end, and consequently, against the claim of the assignee, interpleader, to anything further from said Cold Blast Feather Company.

The judgment of the Superior Court is affirmed.

### Henry Schmidt v. James H. Keeler.

68	487
82	563

1. COMMISSIONS—*Requisites of the Action*.—A real estate broker in order to recover his commissions, must show that he secured a purchaser who was ready, able and willing to buy.

68	487
108	422

**Assumpsit**, for commissions. Appeal from the Circuit Court of Cook County; the Hon. CHARLES G. NEELEY, Judge, presiding. Heard in this court at the March term, 1896. Reversed and remanded. Opinion filed April 13, 1896.

## STATEMENT OF THE CASE.

This was an action in assumpsit for the recovery of commissions claimed to have been earned by the plaintiff while acting as defendant's agent for the sale of his real estate. The defendant pleaded the general issue; the cause was submitted to the court without the intervention of a jury; the issue was found for the plaintiff, and judgment was rendered against the defendant for \$500 and costs, from which judgment he has appealed to this court.

H. T. and L. HELM, attorneys for appellant.

A real estate broker, in order to be entitled to compensation, must find a customer willing to buy upon the terms prescribed by the owner, or on terms which the owner afterward accepts. *Mechem on Agency*, Sec. 965.

The compensation of a real estate broker is contingent upon his success. *Clark v. Nessler*, 50 Ill. App. 550; *Sibbaldt v. Bethlehem Iron Works*, 83 N. Y. 378.

A real estate broker earns and becomes entitled to his commissions only when he procures a purchaser who is ready, willing and able to buy and to complete the purchase, upon the terms specified, or if no particular terms were agreed upon, when he has procured a purchaser to whom the principal sells. *Mechem on Agency*, Sec. 966.

If the vendor accepts the purchaser and enters into a valid contract, the commission is earned, but if he rejects the purchaser, the broker is bound to show not only that the proposed purchaser was willing to accept the offer, but also that he was ready and able on his part to perform all the terms of the purchase. *Pratt v. Hotchkiss*, 10 Ill. App. 603; *Coleman's Executors v. Meade*, 13 Bush (Ky.) 358.

In order to entitle a real estate broker to commission, either the principal or the broker, on behalf of the principal, must have entered into a valid contract with the buyer, and one that can be enforced. *Lang v. Hand*, 57 Ill. App. 134.

Unless it is expressly agreed that the broker has the exclusive authority to sell, the principal may employ several

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Schmidt v. Keeler.

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brokers to sell the same property, or may sell it himself, and the authority of each broker so employed being limited to the particular transaction, the sale of the property either by the principal in person or by any one of the brokers, operates to terminate the authority of all the brokers, although they had no actual notice of the sale. Mechem on Agency, Sec. 969; Ahern v. Baker, 34 Minn. 98; 2 Am. & Ency. of Law, 585.

ROBERT A. CHILDS and CHARLES HUDSON, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

We are compelled to reverse the judgment in this case because of a failure by the plaintiff to make certain proof essential to his recovery.

No conveyance to the purchaser, claimed to have been secured by plaintiff, was made; it was therefore incumbent on the plaintiff to show that such intending purchaser was ready, able and willing to buy; no proof of his ability to buy was made; the only evidence was that he (Sloan) orally agreed to buy.

Appellee says that neither the readiness nor ability of Sloan to buy was disputed at any time.

That is not sufficient. Appellant by his pleading denied every element of appellee's case, and there was no evidence that either the readiness or ability of Sloan to purchase was ever admitted. Upon the trial there was no such admission. Appellant should have been permitted to testify that appellee did not have an exclusive right to sell the house.

The judgment of the Circuit Court is reversed and the cause remanded.

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184s 630.

### Frank F. Cole v. Henry Littledale, Administrator.

1. **BILLS OF REVIEW**—*Leave to File*.—Leave to file a bill of review is not of right but of discretion.

2. **SAME**.—*For Newly Discovered Evidence*.—The application for leave to file a bill of review for newly discovered evidence is analogous to a motion at law for a new trial for the same cause. It would seem that the same principles should apply and the petition should be supported by affidavits of the witnesses by whom it is proposed to prove the facts relied on or some excuse for not obtaining them.

3. **SAME**.—*Practice as at Law*.—On a bill filed for a new trial at law, the court of chancery acts as a court of law would upon such a motion.

**Bill of Review**.—Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 18, 1896.

ZACH. HOFHEIMER, attorney for appellant.

CONSIDER H. WILLETT, attorney for appellee.

A bill of review will not lie upon a decree to pay money until the money is paid. *Horner v. Zimmerman*, 45 Ill. 41, 21; 3 *Daniell's Ch. Pr.* (Perkins' 1st Am. Ed.), Sec. 1730; *Lube, Eq. Pl.*, 179; *Foreman v. Stickney*, 77 Ill. 875; *Kuttner v. Haines*, 135 Ill. 385; *Bruschke v. N. Chi. Schuetzen Verein*, 145 Ill. 446.

If the decree is for the payment of money the party must pay it or give security, although it should afterward be ordered to be refunded. *Lube, Eq. Pl.*, 139; *Staling v. Goodbe*, 3 *Murphey* 159; *Taylor v. Pusen*, 2 *Hawk*. 298.

The proper practice is to make a motion to strike the bill of review from the files because the money due under the decree has not been paid, otherwise—as by a demurrer to the bill of review—this right is waived. *Griggs v. Gear*, 3 *Gilm.* 3.

A second bill of review will not lie to review a decree on the prior bill of review to which a demurrer had been sustained. *Strader v. Byrd*, 7 *O.* 184.

A party can not bring a bill of review after a demurrer



has been filed to the former bill of review. 3 Daniell's Chan. Pr., Perkins' Ed., Sec. 1725; Story's Eq. Pl., Sec. 418; Mitford, Eq. Pl., Sec. 88; Cooper, Eq. Pl., Sec. 92.

It is indispensably necessary to the sufficiency of a bill of review that a copy of the bill, answer, replication and decree in the proceedings sought to be reviewed should be given; a synopsis of the papers is not sufficient. Cox v. Lynn, 138 Ill. 195-204; Turner v. Berry, 3 Gilman 544; Gardner v. Emerson, 40 Ill. 299; Judson v. Stevens, 75 Ill. 255; Goodrich v. Thompson, 58 Ill. 207; Holtz v. Durfee, 122 Ill. 286; Cutter v. Haines, 135 Ill. 382; Bruschke v. Der Nord, etc., 145 Ill. 433.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee is the administrator of Elenora L. Cole, who had obtained a divorce from the appellant. The history of that divorce, and some subsequent proceedings, may be found, so far as is necessary for the present controversy, in Cole v. Cole, 35 Ill. App. 544, and 142 Ill. 19.

October 14, 1895, the appellant filed in the Superior Court the petition now to be considered, in which he alleged and prayed—we copy from the abstract:

"That petitioner, in his answer to said bill of divorce, alleged the gross misconduct of the complainant, Elenora L. Cole, and averred that she had been guilty of repeated acts of adultery with persons unknown to petitioner; that upon hearing of said cause the petitioner was unable to establish said charges; that petitioner made diligent and repeated efforts to produce before the trial court the necessary testimony to establish his charges, but, owing to circumstances over which he had no control, he was unable to properly present the acts of misconduct and adultery of said Elenora L. Cole. That since the rendition of the decree, petitioner has discovered new matter of consequence; particularly, that almost immediately after his marriage with the said Elenora she committed the act of adultery with a number of persons, and was in the habit of frequenting certain

assignment houses in the city of Chicago and also certain hotels in said city, where she was guilty of specific acts of adultery during the pendency of said suit, to wit, from shortly after the filing of the said bill until the rendition of the decree. Notwithstanding the exercise of all reasonable diligence, petitioner could not have obtained said testimony to make use thereof in the case, previous to the announcing of said decree. That since the rendition of the said decree, petitioner has been unremitting in his efforts to set aside and vacate the decree; that recently, to wit, within the past three months, petitioner has ascertained the details of the said Elenora L. Cole's misconduct, during the pendency of this case and up to the rendition of the decree. That petitioner is advised that if said newly discovered facts could have been presented on the hearing of said case, it would have operated as an effectual bar to the decree entered in favor of said Elenora, and would have enabled petitioner to have obtained a decree in his favor annulling his marriage with the said Elenora, and that the decree for alimony in her favor is erroneous and ought to be reversed, and avers that it ought to be set aside by reason of the facts above stated. That said Elenora L. Cole was not entitled to a decree in her favor as she was then guilty of adultery unknown to the petitioner. That during the pendency of the said cause, and prior to the rendition of the said decree, said Elenora L. Cole practiced upon said court a fraud in representing that she had been a chaste and dutiful wife, whereas in fact, she had been guilty of repeated acts of adultery. For all of which errors and imperfections aforesaid, the petitioner is desirous of bringing this, his bill of review, to be relieved in the premises, praying for leave to file bill of review against the said Elenora L. Cole, vacating the decree of alimony and permitting petitioner to produce the necessary evidence establishing the adultery of the said Elenora L. Cole during the pendency of said cause and before the decree was rendered herein."

It is not necessary to make a display of learning on such a petition. Vexed questions as to when the performance of the decree is a condition precedent—when evidence is

cumulative—what diligence is required—will not be considered.

Dexter v. Arnold, 5 Mason, 303, contains enough to dispose of it. Leave to file a bill of review, is not of right, but of discretion (p. 315), and this petition is open to all the objections made by Judge Story to the petition in that case, as shown on pages 319 and 320. This petition gives no names of witnesses—no statement of specific acts to which anybody will testify—nothing by which the discretion of the court is to be guided. The application for leave to file a bill of review for newly discovered evidence, is analogous to a motion at law for a new trial for the same cause.

It would seem that the same principles should apply, and that the petition "should be supported by the affidavits of the witnesses by whom it is proposed to prove the facts relied on, or show some excuse for not obtaining them." Emory v. Addis, 71 Ill. 273; Cowan v. Smith, 35 Ill. 416.

On a bill filed for a new trial at law, the court of chancery acts as a court of law would upon such a motion. Yates v. Monroe, 13 Ill. 212.

It would be a strange inconsistency for a court of chancery to permit a retrial of matters determined by itself, for less certain showing of reason therefor than it would require if the determination were by some other tribunal.

The order striking the petition from the files is affirmed.

There are some irregularities in the record as to the award of executions.

By an order of April 3, 1893, one quarter of the accrued alimony was adjudged to belong to one Latham, and that he "have judgment and execution therefor."

November 9, 1895, the court ordered execution for the whole arrears to issue in favor of the appellee.

It is assigned as error that the court erred in the latter order. We do not find that to be error, but to guard the appellant against double payment, no doubt on his application, the court will make such an order for bringing the money into court—if it can be collected—as will protect him. Affirmed.

63	494
186	31

63	494
112	*307

**Probst Construction Company v. Maurice Foley.**

1. **VARIANCE**—*Must be Raised in the Trial Court.*—The question of a variance between the pleadings and the proofs can not be raised for the first time in the Appellate Court.

2. **VERDICTS**—*On Conflicting Evidence.*—Where the evidence is conflicting and the trial judge who saw and heard the witnesses has approved the verdict, this court will not interfere.

3. **DAMAGES**—*\$5,000 not Excessive.*—In this case it is held that \$5,000 damages awarded are not excessive.

4. **WITNESSES**—*Rights upon the Stand.*—A witness upon the stand has an absolute right to respectful treatment, which it is the duty of the court to enforce.

**Trespass on the Case, for personal injuries.** Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the March term, 1896. Affirmed. Opinion filed April 13, 1896.

**STATEMENT OF THE CASE.**

This was an action on the case, brought by appellee to recover damages for personal injuries. It resulted in a verdict and judgment in his favor for \$5,000.

The appellant was in the contracting and construction business, and had charge of the erection of the Schiller theatre building, at 103 Randolph street, in the city of Chicago. Appellee was in its employ as a common laborer, and on May 20, 1892, was injured by falling through the roof of the building, then in course of construction, and down to the next floor below.

At the time the accident happened, appellee was wheeling concrete on the roof. This material was mixed in the basement and placed in barrows, which were brought up on an elevator to the roof. There was a run-way constructed of two-inch planks, extending from the elevator diagonally across the roof, and it was the duty of appellee to wheel the barrows over this run-way and dump the same, to be spread by other parties as a top dressing.

In constructing the roof iron "beams," six inches deep, and weighing eighteen pounds to the lineal foot, were

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Probet Construction Co. v. Foley.

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placed in position. The distance between these I-beams was six feet six inches from center to center.

The space between the beams was filled in with cement, which was placed in position as follows: Wooden moulds, called "centers," were put between the beams, resting upon the bottom flanges of the beams. These centers were arch-shaped, the upper surface being convex.

After the centers were placed in position, the whole space between the beams above the mould was filled in with cement, the upper surface of which was made level and nearly even with the tops of the beams, and on this, after it became dry, was placed a top dressing which made the top of the roof level and smooth. After the moulds were removed from beneath, the under side, between each pair of beams, would be a cement arch, running the whole length of the beams.

All of these arches were set in imported German Portland cement.

After the cement was put in, the wooden moulds were left in position about three days, until the cement hardened enough to remain set; then they were removed to allow the water to drain out of the cement, and to allow the air to get at the under side, so as to dry the arch.

These moulds were placed there to give the cement the arch shape on the under side, and were left there only long enough to allow the cement to harden sufficiently to keep its shape.

There is no charge in the declaration that the kind of cement used, or the materials entering into it, were improper, or of insufficient cohesive strength to render the roof safe, and there is no charge that this method of constructing the roof was improper, unsafe or dangerous.

Plaintiff's case rests upon the proposition that the roof was not properly supported, and that while he was in the exercise of ordinary care, the roof gave way and precipitated him to the floor below.

The declaration consists of two counts. In the first it is charged that the defendant "negligently and carelessly failed to provide proper supports to sustain said roof, and

while this plaintiff was upon said roof, as aforesaid, and in the exercise of due care on his part, and without knowledge that said roof was not properly supported, said roof fell."

The second count charges that the defendant "negligently and carelessly failed to provide supports, or props, or stays to support said roof, and did direct this plaintiff to go upon said roof, when it knew, or might have known, by the exercise of ordinary care and prudence, that the support of said roof was wholly insufficient, on account of which \* \* \* said roof or a portion of said roof, in and upon which plaintiff was then and there wheeling concrete, fell."

WILLIAM B. KEEP, attorney for appellant.

WILCOX & GETTYS and BRANDT & HOFFMAN, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

It is urged that as there is no evidence tending to show that the roof as a whole was improperly supported, there is no proof to sustain the plaintiff's declaration. This is but a variance, which, not having been pointed out on the trial, where by amendment the objection could easily have been removed, it can not for the first time be insisted upon here.

Conceding that the supports to the cement arches were left in position as long as is usual, the fact remains that either by reason of the plank upon which appellee was walking falling upon and breaking through the cement, or because appellee stepped off this plank upon the cement, the arch gave way and appellee, falling through the opening, was injured.

Appellee knew nothing of the character of the cement work; he was told to walk upon the plank, and it is contended that this rested upon the iron beams, and so could not break through the cement. If the plank did all the while rest entirely upon the iron beams, it would not interfere with the cement, but if it slipped a few inches either lengthwise or sidewise, at one end, such end might come

upon the cement, and when appellee stepped thereon might break through. That a portion of this plank did go through the hole down which appellee fell, is testified by two witnesses. There is some uncertainty about this; other witnesses testifying that the plank remained in its proper place. With such conflict the jury, as was to be expected, found for the plaintiff. The trial judge has approved the verdict; he saw and heard the witnesses; if satisfied that the defendant's version of this was true, he should have granted a new trial. We can not, upon the record here presented, in the face of the action of the trial court, say that as to the falling of the plank the plaintiff's statement is untrue.

Unless it be assumed that the plaintiff stepped off the plank, it can not be said that he did not exercise ordinary care.

The damages awarded seem large, but are not so great as to shock our sense of right, or to clearly indicate that the jury was swayed by passion or prejudice.

The manner and method of counsel for the plaintiff in his cross-examination of witnesses for the defendant was not such as we can approve.

As we have before said (*Chicago City Ry. Co. v. Baron*, 57 Ill. App. 469), all persons while upon the witness stand, be they high or low, rich or poor, ignorant or learned, of good or evil repute, leading orderly or dissolute lives, have an absolute right to respectful treatment, which it is the duty of the trial court to enforce.

A witness is not, during his examination, to be ridiculed because of his imperfect pronunciation or bad grammar; nor should the court permit counsel to ask questions in an insulting manner.

The facts of this case, as presented by the record here filed, are such that we are of the opinion the jury would have found as they did, had counsel for plaintiff omitted all of which complaint is made. Nor is the finding one which we look upon as unjust, although we should have been better satisfied had the damages awarded been less.

The judgment of the Circuit Court is affirmed.

## CASES

IN THE

# APPELLATE COURTS OF ILLINOIS.

THIRD DISTRICT—MAY TERM, 1895.

### Oakford & Fahnestock v. James Dunlap.

1. SALES—*To Creditors by Persons in Insolvent Circumstances.*—A sale of his goods by an insolvent merchant to a creditor is valid as between them and such insolvent may lawfully prefer a creditor to the extent of his claim and pay him in goods at a fair price, however it may affect his other creditors or whatever may have been his intention known or unknown to such creditor.

2. DEBTOR AND CREDITOR—*Right to Prefer One or More Creditors.*—A debtor may indulge his preferences among his creditors and so pay some or only one, although he knows the effect must be to hinder, delay or defeat the others and deliberately intends to produce such effect. The creditor so preferred may lawfully receive it although fully aware of the effect and apprised of his debtor's intention as to others, provided only that he takes it in good faith as payment of his debt.

3. FRAUDULENT SALES—*Void as to Creditors—Vendee Not Protected.*—A purchaser of goods from an insolvent person with knowledge that the effect of his purchase is to hinder and delay the creditors of such person and that such was his intention in making the sale, though for cash and at a fair price, can not hold it against the creditors of the vendor.

4. SAME—*Fraudulent as to Part—So as to All.*—Where the property transferred by a debtor in failing circumstances is divisible into parts, one part having no necessary connection as property with the other, and a creditor takes one part in payment of his debt and purchases the other for cash or some other valuable consideration paid or agreed to be paid, such creditor takes the latter part of the property as a purchaser, and

63	498
69	325
63	498
80	601

63	498
95	618

63	498
105	6102



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having taken both parts by one and the same contract, if the transaction is fraudulent as to either part, it is so as to both.

**Trial of the Right of Property.**—Appeal from the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1895. Reversed and remanded. Opinion filed December 6, 1895.

*Instructions referred to in the opinion of the court:*

2. You are instructed that if Royster owed James Dunlap a note for \$709 as claimed, and an account for about \$90.66 as claimed, and if James Dunlap assumed the payment of \$620 due Smith-Wallace Shoe Co., and a note of \$189 due Lydia Witham from Royster, and if James Dunlap executed and gave his note to Royster for the balance of the invoiced price of said stock of goods, then such considerations, if in good faith, were as valid for the purchase of said goods by Dunlap as if he had paid for them in cash, or in any other way.

7. You are instructed that even if you believe from the evidence that what George W. Royster did in selling his stock of goods to James Dunlap was in bad faith and wrongful to his creditors, yet if you further believe from the evidence that James Dunlap acted in good faith and paid a valuable consideration for said goods by canceling a note of his own and assuming debts of Royster and giving his (Dunlap's) note for the balance, then the claimant, Dunlap, is not bound by such bad faith and wrongful acts of Royster, if any, not participated in by Dunlap.

9. You are instructed that if you believe from the evidence that claimant, James Dunlap, acted in good faith and upon a *bona fide* and valuable consideration in buying Royster's stock of goods, and participated in no fraudulent purpose, if any existed on the part of Royster, in that case the sale to Dunlap can not be defeated by any such fraudulent purpose as may have existed on the part of Royster alone.

KERRICK, SPENCER & BRACKEN, attorneys for appellant.

Every gift, grant, conveyance, assignment, or transfer of, or charge upon any estate, real or personal, or right or thing in action, or any rent or profit thereof, made with the intent to disturb, delay, hinder, or defraud creditors, or other persons, \* \* \* shall be void as against such creditors, purchasers and other persons. Illinois R. S., Chap. 59, Sec. 4; Starr & Curtis, Vol. 1, page 1196.

To delay and hinder creditors in the collection of their claims, is to defraud them. Weber, use, etc., v. Mick, 131 Ill. 520.

Every conveyance of property, real or personal, made for the purpose of delaying, hindering or defrauding creditors,

is by the statute of frauds and perjuries declared to be void as against such creditors. If a conveyance is made with such fraudulent intent and object, it is not purged of fraud because there may also have been some other purpose in view, such as the discharge of the debt due the grantee. Hansen v. Dennison, 7 Ill. App. 77.

Where a debtor sells property with the intent to hinder, delay, or defraud his creditors, notice to the purchaser of the debtor's fraudulent intent is *per se* evidence of *mala fides*, and renders the sale void without reference to the purchaser's actual intent, the fraudulent motive of the debtor being imputed to the purchaser. Hanchett v. Goetz, 25 Ill. App. 445; 40 Ill. App. 207.

A transaction is not purged of fraud because such intent was not the sole purpose of the parties to the transaction. Levy v. Reitz, 25 Ill. App. 619; Merry v. Bostwick, 13 Ill. 398-410; Boies v. Henney, 32 Ill. 130; Reed v. Noxon, 48 Ill. 323; Strohn v. Hayes, 70 Ill. 41; Hansen v. Dennison, 7 Ill. App. 73.

Even though the grantee or assignee pays a valuable, adequate and full consideration, yet, if the grantor or assignor sells for the purpose of defeating the claims of his creditors, and such grantee or assignee knowingly assists in effecting such fraudulent intent, or even has notice thereof, he will be regarded as a participator in the fraud, for the law never allows one man to assist in cheating another. Beidler v. Crane et al., 135 Ill. 99.

While it may be that a debtor, acting in good faith under certain circumstances, can lawfully prefer one creditor in payment of his claim to the exclusion of other creditors, yet a transaction entered into to give certain creditors the benefit of such a preference by transferring to them all the available assets of the debtor, and in value greatly exceeding the amount of the preferred debts, with the power to sell and dispose of such assets, without accounting for the proceeds and without providing for the payment of debts due other creditors out of the surplus, and coupled with an intent and purpose on the part of the debtor, in making such transfer,

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to hinder and delay his other creditors in the collection of their debts, is fraudulent and void. *Thorne v. Crawford*, 17 Ill. App. 398.

If the purchaser from a fraudulent vendor buys with notice of the fraudulent intent of his vendor, he stands in his vendor's shoes, and notice may be inferred from the existence of certain facts and circumstances that would place a man of ordinary prudence on inquiry with reference to the conduct of his vendor. *Thompson et al. v. Duff*, 19 Ill. App. 78; *Cowling v. Estes*, 15 Ill. App. 260; *Bump on Fraud. Con.*, 2d Ed., 200; *Gradle v. Kern*, 109 Ill. 563.

Direct and positive evidence that the grantee of property is guilty of participating in the fraudulent intent of the grantor in making a sale to defraud creditors, is not required in order to avoid a sale. Fraud on the part of the grantee, or purchaser, may be shown by facts and circumstances from which it may be inferred. *Treadwell v. McEwen*, 123 Ill. 253.

As to the notice to be brought home to a purchaser, in order to charge him with knowledge of his vendor's fraud, see *Doyle v. Teas*, 4 Scammon, 202; *Rupert v. Marks*, 15 Ill. 540; *Merrick v. Wallace*, 19 Ill. 486; *Morrison v. Kelley*, 22 Ill. 610; *Hatch v. Bigelow*, 39 Ill. 546; *Harper v. Ely*, 56 Ill. 179; *Babcock v. Lisk*, 57 Ill. 327; *Burt v. Coleman*, 89 Ill. 364; *Railroad Co. v. Kennedy*, 70 Ill. 350; *Life Ins. Co. v. Ford*, 89 Ill. 252.

LILLARD & WILLIAMS, and FRANK GILLESPIE, attorneys for appellee.

Notice to or knowledge of the fraudulent intent of a grantor to defraud other creditors carried home to the grantee, avails nothing if such grantee, in taking the property, is actuated by a desire in good faith to receive payment of an honest debt. *Windmiller v. Chapman*, 38 Ill. App. 282; *Gray v. St. John*, 35 Ill. 222; *Weber v. Mick*, 131 Ill. 526.

The consideration of Dunlap's own note and claims against Royster is admitted by appellants' brief to be good,

and is held by the courts to be good. *Schroder v. Walsh*, 120 Ill. 403.

The consideration of Dunlap's paying the Smith-Wallace Shoe Co. and Lydia Witham notes against Royster was good. *Wood v. Clark*, 121 Ill. 366; *Kuhlenbeck v. Hotz*, 53 Ill. App. 680.

MR. PRESIDING JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment on a verdict for the claimant on a trial of the right of property. The facts, in outline, are as follows:

George W. Royster was conducting a general mercantile business in the village of Anchor, in the course of which he became indebted to appellants and other parties. Among them was his step-father-in-law, the appellee, who was farming in Indiana. In June, 1894, an agent of the Smith-Wallace Shoe Co., a creditor to the amount of \$620, came to Anchor to get a settlement, which Royster did not then make to his satisfaction, but went to Indiana and told his trouble to Dunlap, who accompanied him on his return and on the 11th of June received from him a bill of sale of the stock which was substantially all the property he had, for the cost price of \$2,831.99, at which it was invoiced. This he paid by cancellation of his own claim, amounting to \$799.66, assuming the debt to the Smith-Wallace Shoe Co. of \$620, and a note held by Mr. Witham for \$189, and giving his own note payable in one year for the balance of \$1,223.33.

While this invoice was being taken by the parties and Mr. Noll—Royster's clerk—which was from one to two o'clock in the morning until some time in the afternoon of June 11th—the store was closed. Upon reopening, Dunlap remained in and about it, made one or two sales, told several that he had bought out the store, took a lease of the building and hired Noll for his clerk. Early the next morning he left for Indiana to look after his harvest, with directions to Noll to advise him at once if the creditors did anything, and intending to return and carry on the store as soon as he

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Oakford & Fahnestock v. Dunlap.

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could make the necessary arrangement. He had previously been in that business for about a year.

On the 15th of June, while Dunlap was absent, appellants, who were creditors of Royster to the amount of \$283.50, sued out of the County Court a writ of attachment against his goods which was levied on this stock, and at the August term following obtained judgment by default and an award of special execution. Dunlap then commenced this proceeding under the statute to try the right of property. Other attachments out of the same court had in the meantime been issued and levied upon the same goods. He gave notice of his claim in those cases also, and all were tried together by the court without a jury. The result was a judgment for the claimant, from which an appeal was taken to the Circuit Court, where, on trial by a jury, the same result followed, and this further appeal.

The sale from Royster to Dunlap was undoubtedly valid as between them. Nor is it denied that Royster's debt to Dunlap as claimed was *bona fide*, nor that he might lawfully prefer him to the extent of that claim and pay him in goods at a fair price, however it might affect his other creditors, or whatever may have been his intention, known or unknown to Dunlap, with respect to them. But it is insisted that by transferring other goods and receiving in payment therefor his note, due in one year, he necessarily hindered and delayed his other creditors in the collection of their debts by putting these goods and their proceeds beyond their reach and is therefore to be charged with having intended that effect; and that Dunlap either knew directly or was put upon inquiry by which he would have known that such was his intention, and is therefore to be charged with having participated in it.

Upon such a state of facts the sale should be held fraudulent and void as to those creditors.

The law makes a distinction between transfers of property by an insolvent debtor to a creditor, in payment of his debt, and to a purchaser who is not a creditor, for a price received or to be received. In its application as pay-

ment he may indulge his preference among creditors, on whatever ground, and so pay some or only one, though he knows the effect must be to hinder, delay or defeat others and deliberately intends to produce it. And the creditor so preferred may lawfully receive it, though he may be fully aware of the effects and apprised of his debtor's intention as to others, provided only that he receives it in good faith as payment of his claim. But a purchaser with knowledge of such effect and intention, though for cash and at a fair price, can not hold it against creditors of the vendor. In the one case the debtor divests himself of so much of his property to pay only what he justly owes. In the other he really divests himself of none, but only so changes its form as to put it beyond the reach of his creditors against his own will; in other words he conceals it, with the intention of hindering or delaying them in the collection of their just dues, and the purchaser knowingly aids him in the execution of the fraudulent purpose.

When the property transferred is clearly divisible, one part having no necessary connection as property with the other, as two horses, or two tracts of land, and the transferee takes one for his debt and the other for cash or some other valuable consideration, paid or agreed to be paid or delivered to or for the transferrer, he takes the latter as a purchaser no less so than if he had taken it by a separate contract at another time. He can not escape the liability of a strict purchaser on the ground that it was so related to the other as to enhance its value. Having taken both by one and the same contract, if it was fraudulent as to either it tainted the whole transaction.

Such we understand to be the law applicable to this case, but are compelled to the conclusion that the jury did not. There can be no reasonable doubt that of a large proportion, being a clearly distinguishable part of the goods in question, appellee was strictly and only a purchaser. It may be doubted whether he was an antecedent creditor as to more than \$800. If what he assumed to pay the shoe company and Mrs. Witham had any existence as a debt

from Royster to him before the sale was consummated, its assumption was with a view to its being a part or condition of the contract of sale, and we are therefore inclined to think it was not an antecedent debt—such as might have been contracted under different and justifying circumstances. But however that may be, there was a purchase for another and new consideration of at least \$1,233.33 worth of goods, distinguishable and divisible from all other that was included in the sale. It was not for him to say that he would not be so likely to realize for the other, separated from this, the full amount he allowed for it as if the stock was kept unbroken. He didn't take the other to be separated, or merely as payment of the debt due him, but intended having the entire stock for the purpose of carrying on the business and making out of it more than the price to him and all incidental expenses. The purchase of this part was therefore not ancillary to the collection of his debt merely, but for a further and distinct purpose. If the other was not sufficient to pay his debt without deduction for necessary expenses in converting it, he should have required more goods for that purpose and taken the risk of its effect upon the question of his good faith and fairness, if such a question should arise. He deliberately accepted them at cost price in full satisfaction of his debt, and should be estopped to say he was compelled to purchase more in order to satisfy it.

There was evidence clearly and strongly tending to prove that appellee was directly informed by Royster himself of his financial embarrassment. He had testified in the County Court that he knew of claims other than his own, amounting to \$1,200, and further admitted on the trial in the Circuit Court that at the time it was made, he thought there might be some trouble with the creditors about this sale, though not very much; that he told Noll, after he left Anchor, to let him know at once in case they did anything, and that he did not come there to collect his debt alone, but to help Royster out also. This was all from his own lips and under oath.

Other evidence, with like force, tended to prove that he knew Royster had no other property, and that if he held under this sale the inevitable effect must be to hinder and delay other creditors; and knew that Royster must have so understood, and therefore must so have intended. A sale with such intent on the part of the seller, and such knowledge or notice of it on that of the purchaser, is fraudulent and void as to creditors of the former.

With this evidence before them, and a proper understanding of the law applicable to it, we do not see how the verdict could honestly be found. Not to impute dishonesty, we must infer misunderstanding.

We think that some of the instructions given for appellee, as appears in this case, were lacking in discrimination and liable to mislead a jury. Thus, the second was, that if Royster owed Dunlap, and Dunlap assumed his other debts mentioned and gave him his note for the balance of the price, "then such considerations, if in good faith, were as valid for the purchase of said goods by Dunlap as if he had paid for them in cash, or in any other way." The condition, "if in good faith," as here used, could hardly mean more than if the considerations paid were not shams but really what they purported to be, and were paid to Royster in good faith as respected him. That they were so was not made a question in the case, and it is clear that such payment made the sale valid as between the parties. But the conclusion, as stated, was not so qualified by the instruction. It made no reference whatever to the remaining creditors of Royster, and if the court did not take them into account why should the jury be expected to do so?

One of the hypotheses assumed in the fourth was, that what Dunlap did was for the sole purpose of collecting his debt. We find in the record no evidence to warrant the assumption.

The seventh stated that Dunlap was "not bound by bad faith or wrongful acts of Royster, if any, not participated in by him." Might not a jury mistake this for a declaration by the court that Dunlap did not participate? We think



“unless” or “if not” participated in, would have been better. Besides, the instruction failed to explain what constitutes participation in such a case; and the ninth is subject to the same criticism. Nowhere in appellee’s instructions is it intimated that notice to the purchaser of the fraudulent intent of the seller would make him a participant, in the view of the law, whether he was actually so in fact or not.

That which, in these instructions, was perhaps most likely to mislead the jury, was the prominence they give to appellee’s position as a creditor rightfully preferred to others by their common debtor, rather than that of a purchaser strictly, which he also clearly occupied, and which presented the real issue; for only as such purchaser was his knowledge of a fraudulent intent on the part of Royster with reference to his creditors material, and the question of such knowledge was the vital question in the case.

But whatever may have been the cause of it, this verdict was, in our judgment, so manifestly against the law and the evidence that it should not have been allowed to stand.

Every material point here involved, seems so fully covered and disposed of by the case of *Hanchett v. Goetz*, 25 Ill. App. 445, and the same on another appeal, 40 Id. 206, that we deem it unnecessary to refer to any other.

For the reasons above stated, the judgment will be reversed and the cause remanded.

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**Archibald C. Wadsworth, Stephen R. Capps and Vincent S. Richardson, impleaded with Lloyd W. Brown et al., v. George W. Laurie.**

1. *ATTACHMENT—For Constructive Fraud.*—The writ of attachment does not issue for mere constructive fraud as contradistinguished from fraud in fact.

2. *FRAUD—As the Foundation of a Suit in Attachment.*—Although a transaction may be regarded by a court of equity as constructively fraudulent, and therefore subject to be set aside at the instance of cred-

itors, yet unless there is a fraudulent purpose or design actuating the defendant, it is not within the statute of attachments.

3. INSTRUCTIONS—*To Find for the Defendant, When Proper.*—Where the evidence presents a case in which a verdict for the plaintiff would necessarily have to be set aside, it is proper to instruct the jury to find for the defendant.

**Attachment Proceedings.**—Appeal from the Circuit Court of Morgan County; the Hon. CYRUS EPLER, Judge, presiding. Heard in this court at the May term, 1895. Affirmed. Opinion filed December 10, 1895.

MORRISON & WORTHINGTON and RICHARD YATES, attorneys for appellants.

In all actions at law by and against unincorporated associations, all members must be made parties to the same as in the case of ordinary partnership. 2 Lindley on Part. 1083.

Unless there are some special circumstances of this sort (creating a separate liability), "a contract which is binding upon the firm is binding upon all the partners jointly and upon none of them severally." Id., Vol. 1, p. 366.

Where there are several parties, if their contract be joint, they must all be made defendants, although they subsequently arrange among themselves that one only of them shall perform the contract. And a partner who retires from the firm is liable for the old debt, although the debt be carried by consent of the debtor to the account of the remaining partners and he takes their bill of exchange; there being no actual satisfaction or release of the responsibility of the retiring partner. 1 Chitty on Pleading, 42.

Joint contractors must all be sued, although one has become bankrupt and obtained his certificate; for if not sued the others may plead in abatement. Id. 42a; Pettis v. Atkins, 60 Ill. 458.

All parties who owned shares of stock of the Central Bank and received dividends thereon, became partners and joint contractors, although they did not sign the articles of association. Pettis v. Atkins, *supra*, 457; 2 Lind. on Part. 1083-4.

In such an association, as between retiring members and

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creditors of the company, such retiring members remain liable for all existing debts, and they may be liable for subsequent debts to creditors who had knowledge of their membership, but had no notice of their withdrawal. 2 Lind. on Part., 1085, n.; *Hayward v. Burke et al.*, 151 Ill. 131.

A dormant partner is he whose name and transactions as a partner are professionally concealed from the world. *Collyer on Part.*, Sec. 4; 2 *Bouvier*, 291; 56 *Am. Dec.*, 147 n.

A dormant partner is one whose name is not mentioned in the title of the firm, or embraced in some general term, as company, sons, etc. *Jones v. Fegely*, 4 *Phil.* 1; *Waite v. Dodge*, 34 *Vt.* 181.

One who is a member of a partnership, trading upon the firm name of *R. M. & Co.*, does not become a dormant partner by reason of the creditor being ignorant of the name of the copartner of *R. M.* 1 *Lind on Part.*, 405 n, 2; *Deford v. Reynolds*, 36 *Pa. St.* 325.

Persons doing business under the name of "The Citizen's Bank" are not dormant partners and are required to give notice upon retiring from the firm to relieve themselves from liability. 1 *Collyer on Part.* (6th Ed.), 15.

So, also, a person is not to be deemed a dormant partner because his name does not appear in the firm and partnership style which they chose to adopt, but when the partners are indicated by the word company. *Goddard v. Pratt*, 16 *Pick.* 428-9; *Shamburg v. Ruggles*, 83 *Pa. St.* 148.

OWEN P. THOMPSON and JOHN A. BELLATTI, attorneys for George W. Laurie, appellee, contended that the principal error complained of is that of the court taking the evidence on the attachment issue from the jury, and by instruction directing them to find for the defendant on that issue; a considerable amount of evidence was introduced by the plaintiff on that issue, and it should have been left to the jury to pass upon the weight of it.

When a cause fairly depends on the effect or weight of the evidence, it is a cause for the jury, under proper instruc-

tions as to the law. *Chicago & N. W. R. R. Co. v. Snyder*, 128 Ill. 655.

Where the evidence tends to prove the issue it should not be excluded, although in the opinion of the court it may not be sufficient to warrant a verdict. *Crowley v. Crowley*, 80 Ill. 469; *Gas Light & Coke Co. v. Graham*, 28 Ill. 73; *Kitzsinger v. Sanborn*, 70 Ill. 146.

What the evidence proves or tends to prove is a matter for the jury. *Dickerson v. Sparks*, 17 Ill. 178; *Stacy v. Cobb*, 36 Ill. 349; *Yundt v. Hartrunft*, 41 Ill. 9; *Aurora v. Pennington*, 92 Ill. 564; *Peoria F. & M. Ins. Co. v. Anapow*, 45 Ill. 86.

If there is no evidence before the jury, on a material issue, in favor of the party holding the affirmative of that issue, on which the jury could reasonably find in his favor, the court may exclude the evidence, or direct the jury to find against the party so holding the affirmative; but when there is such evidence before the jury it must be left to them to determine its weight and effect. It is not within the province of the judge, on such a motion, to weigh the evidence and ascertain where the preponderance is. This function is limited strictly to determining whether there is, or is not, evidence legally tending to prove the fact affirmed—that is, evidence from which, if credited, it may reasonably be inferred, in legal contemplation, the fact affirmed exists, laying entirely out of view the effect of all modifying or countervailing evidence. *Frazer v. Howe et al.*, 106 Ill. 563; *Gordon v. Corbett et al.*, 87 Ill. 272.

The Circuit Court has no power to take the decision of facts from the jury. When there is evidence tending to prove the issue, the evidence must be submitted to the consideration of the jury. *C., B. & Q. R. R. Co. v. Sykes, Adm.*, 96 Ill. 162.

We think that under the rules laid down in the following authorities the evidence in this case was ample to sustain the attachment.

A transfer is fraudulent as to creditors if it hinders or delays creditors. *Harting v. Jockers et al.*, 136 Ill. 627;

Emerson v. Bemis, 69 Ill. 537; Davidson v. Burke, 143 Ill. 146.

When the facts and circumstances show the transfer to be fraudulent, the oath of the party that it was made in good faith is of little weight. Bell v. Devan, 96 Ill. 217; Phelps v. Curts, 80 Ill. 109.

A mortgage given to hinder and delay creditors, although it may also be given to secure a *bona fide* debt, is fraudulent as to creditors. Thorne v. Crawford, 17 Ill. App. 395.

When the object of the grantor, in making the conveyance, was to hinder or delay his creditors, such instrument is not purged of the fraud because the grantor may also have had some other purpose in view. Reed v. Noxon, 48 Ill. 323.

When a debtor heavily indebted makes a mortgage on the bulk of his property to one creditor, the security being in excess of the debt, and the effect will be to prevent other creditors from collecting their debts, an attachment on the ground of fraudulent conveyance will lie. Smith v. Boyer, (Neb.) 45 N. W. 265.

The placing of property in the hands of an assignee for any other purpose than to enable him to distribute to creditors, must hinder and delay creditors, and is fraudulent. The law gives the creditor the right to determine whether his debtor shall have further indulgence, or whether he will pursue his remedy for the collection of his debt. Van Nest v. Yoe et al., 1 Sand. Ch. 4; Kellogg v. Slawson, 15 Barb. 56; Gardner v. Commercial Bank, etc., 95 Ill. 298.

A debtor is only allowed to place his property beyond the reach of creditors, by making a general assignment of all his property, when he does so for the benefit of his creditors, by devoting it fairly to the payment of his debts, and not with a view to his own advantage. Nesbet v. Digby, 13 Ill. 387; Phelps v. Curts, 80 Ill. 113; Gardner v. Commercial Bank, etc., 95 Ill. 298.

Counsel for appellants contend that all persons who were at any time their partners must be made joint defendants with them.

At common law, if A, for a consideration, promised B to pay C a sum of money, C could not avail himself of A's promise by suit in his own name. But that rule has been changed in nearly every State in the Union. 16 Am. & Eng. Encyc. of Law, 885.

The rule established in this State that if A, for a consideration from B, assume to pay B's debt to C then, C, can if he chooses, maintain a suit against A for the debt so assumed. Dean, use of, v. Walker, 107 Ill. 540; Ray v. Williams, 112 Ill. 91.

Then again, secret or dormant partners need not be joined as defendants. Page et al. v. Brant, 18 Ill. 37; Goggin v. O'Donnell, 62 Ill. 66.

EDWARD P. KIRBY, attorney for said Lloyd W. Brown, contended that the attaching creditor must comply strictly with the requirements of the statute in all matters of form. The burden of proof rests upon him to establish clearly that condition of things which authorizes the exercise of this extraordinary remedy. Lawrence v. Yeatman et al., 2 Scam. 15; Vairin et al. v. Edmonson et al., 5 Gilm. 270; May v. Baker, 15 Ill. 89; Cariker v. Anderson, 27 Ill. 358; Haywood v. Collins, 60 Ill. 328.

Three things must be found to exist before any attachment writ can be held valid, viz.: First, a creditor to be defrauded. Second, a debtor intending to defraud. Third, a conveyance by which the property of the debtor is fraudulently put out of the reach of the ordinary process of law.

There was no evidence adduced to show that Lloyd W. Brown was intending to defraud any creditor by any of the conveyances or transactions shown in the evidence in this case. Such intent is a necessary element, except in cases of voluntary conveyance without consideration, where the party making the conveyance has no property left with which to pay his just debts. Shove v. Farwell, 9 Ill. App. 256.

The statute contemplates that this fraud shall be one of fact, as distinguished from a legal or constructive fraud. If a man has shown himself to be dishonest by making a

conveyance of his property, designing thereby to delay and hinder his creditor, and such effect is produced, then for the space of two years, the statute permits the creditor to treat him as one who may repeat his fraud, and authorizes its prevention by a seizure of his property upon mesne process, and hold it to answer any judgment that may be rendered in the action. *Shove v. Farwell*, 9 Ill. App. 256; *Spencer v. Deagle*, 34 Mo. 455.

To make a debtor's transfer of property fraudulent as respects his creditors, there must be an intent to defraud, express or implied, and an act which, if allowed to stand, will actually defraud them by hindering, delaying or preventing the collection of their claims. *Baldwin, Adm'x, v. O'Laughlin et al.*, 28 Minn. 544; *Dempsey v. Bowen*, 25 Ill. App. 192.

A debtor, although in failing circumstances, but not seeking the benefit of the general assignment law, may in good faith prefer one creditor to another, though the claim of each creditor be equally meritorious. *Hesing v. McCloskey*, 37 Ill. 341; *Morris v. Tillson*, 81 Ill. 607; *Goembel v. Arnett*, 100 Ill. 34; *Shroeder v. Walsh*, 120 Ill. 403.

And such preference will be upheld, although the ultimate effect of the preference be to delay other creditors. *Francis v. Rankin*, 84 Ill. 61; *Hovey et al. v. Holcomb et al.*, 11 Ill. 660.

MR. JUSTICE WALL DELIVERED THE OPINION OF THE COURT.

Since the opinion was filed in this case, our attention has been called to the brief of the said Laurie upon the point raised by his assignment of error. As was stated in the opinion, he also appealed and had assigned error upon the judgment against him on the issue raised by the plea in abatement traversing the affidavit for a writ of attachment against the estate of Lloyd W. Brown, but as we found nothing in the brief on the point, we assumed it had been abandoned.

It appears that a separate brief had been filed, fully discussing that point, but from some accidental cause it did not

come to our notice. It is proper, therefore, that we should now consider it and express our views in regard thereto.

The affidavit for attachment alleged that Lloyd W. Brown, within two years prior to the date, had "fraudulently conveyed or assigned and disposed of his effects and property, or a part thereof, so as to hinder and delay his creditors." A plea was filed traversing the affidavit, and the issue was tried by jury. At the close of the testimony the court instructed the jury to find the issue for the defendant, which was done. It is urged that herein the court erred.

The evidence relied upon by the plaintiff to support the attachment was:

1st. That on the 8th day of May, 1893, the said Brown conveyed to W. E. Vietch, cashier of the Central Bank, 1,004 acres of land for the expressed consideration of \$75,000, which was filed for record August 26, 1893, the day following the appointment of the receiver on the bill in chancery heretofore referred to.

2d. The filing of said bill, under and pursuant to which said receivers were so appointed and took possession of all the assets of said bank.

3d. A trust deed executed by said Brown to E. P. Kirby, September 13, 1893, covering some 1,500 acres of land, to secure sundry items of indebtedness to different persons, aggregating over \$98,000.

4th. A mortgage by said Brown to Mrs. Adams, dated July 20, 1893, covering 800 acres of land, to secure an indebtedness of \$60,000, and any additional sum that might afterward be loaned by the mortgagee to the mortgagor.

In disposing of the question here presented, it is important to ascertain in the first place what is the meaning of the statutory provision upon which the writ of attachment was based.

The Supreme Court have construed the statute in the case of *Weare Commission Co. v. Duley*, 156 Ill. 25. In substance, the ruling is that the writ may not issue for mere constructive fraud as contradistinguished from fraud in fact. In other words, though the transaction be such that a court



of equity might regard it as constructively fraudulent, and therefore subject to be set aside at the instance of creditors, yet unless there was a fraudulent purpose or design actuating the defendant, the case is not within the statute.

Applying the rule so announced to the facts in proof, we entertain no doubt that the plaintiff wholly failed to sustain the charge made in the affidavit, and that the court was perfectly justified in the instruction to find for defendant.

Regarding the first transaction—the deed of a valuable tract of land to Vietch, cashier of the bank—it appears the purpose was to strengthen the bank, and while the deed was absolute on its face, it was subject to a condition that the grantee should hold the land for the protection of the bank, the grantor to enjoy merely the use and occupancy, and that when the necessity for such protection should no longer exist, the lands were to be reconveyed to the grantor. Conceding, for the sake of argument, that equity would hold such a transaction as voidable at the instance of creditors, yet very clearly there was no dishonest purpose manifested thereby. On the contrary, the purpose was laudable, *i. e.*, to secure and protect the creditors of the banking house of which the grantor was one of the members, and as a matter of fact, the lands so conveyed were appropriated by the receivers as a part of the bank assets, and the plaintiff will, as a creditor of the bank, receive his due share of the proceeds.

As to the filing of the bill to wind up the concern and as a preliminary step placing the assets in the hands of a receiver—we are unable to discover fraud either actual or constructive.

When it was ascertained that by reason of the existing conditions the bank could no longer be conducted with safety, it was the legal duty of those in control to suspend and take such course as would insure a fair distribution of the assets among the creditors. It would have been indictable to continue receiving deposits when the fact of insolvency was known. As a matter of prudence and in

justice to all concerned the first public announcement would be that receivers had been appointed. The honest object being to secure an equitable distribution of the assets it was entirely proper to place the entire estate in the custody of the law. The fact that the application for a receiver was made at an unusual hour, and that the order was made by a judge in vacation, can not be urged as proof of fraudulent purpose.

It was necessary to proceed with haste and on account of the absence of counsel the application was somewhat delayed. Nor is the defendant to be charged with a fraudulent purpose merely because as a matter of law it is not competent for a judge acting in vacation to appoint a receiver.

While knowledge of the law is to be inferred for certain purposes, yet this is a mere legal presumption. It is a maxim, that ignorance of the law does not excuse; but fraud is not to be inferred from or predicated upon an act, otherwise blameless, because done without legal authority. Here the defendant acted upon the advice of counsel and obtained an order from the judge of the Circuit Court which was supposed to be regular and was not very uncommon as a matter of practice. No doubt he acted in good faith and it would be a gross perversion of the law to make this act the basis for a writ of attachment on the ground of fraud.

Some stress is laid upon the alleged fact that the bank was kept closed on the 25th of August upon the mere pretext of the death of the mother of Mr. Vietch, the cashier, but in view of all the proof we regard the point as requiring no consideration.

As to the deed of trust and the mortgage there is nothing upon which the charge of fraud can rest. It does not appear that these conveyances were in bad faith or that the several debts they were given to secure were either colorable or misstated in any particular. Regarding the proof as a whole we are satisfied a verdict for the plaintiff would necessarily have been set aside. In such a state of case it is proper to instruct the jury to find for the defendant. C. & T. R. R. Co. v. Simmons, 110 Ill. 340. Affirmed.

**Nannie C. Beuter, Adm'x, etc., v. Isalah Dillon et al.**

1. **SURETIES**—*Released by an Extension of Time.*—An agreement by the principal maker of a note to keep the money for another year and pay the same interest, is a sufficient consideration for the extension agreement, and will, without the consent of the surety, release him.

**Bill for Injunction**, to restrain prosecution of a suit. Error to the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1895. Affirmed. Opinion filed December 10, 1895.

LILLARD & WILLIAMS, attorneys for plaintiff in error, contended that, if extension is not for a definite period, agreed on by both the creditor and principal, the sureties are not released, however formal and positive the attempt at a binding extension may have been. *Gardner v. Watson*, 13 Ill. 352; *Truesdell v. Hunter*, 28 Ill. App. 296; *Crossman v. Wohlleben*, 90 Ill. 542; *Waters v. Simpson*, 2 Gil. 574; *Flynn v. Mudd*, 27 Ill. 325.

If Gilstrap's request, July, 1891, to Mr. Beuter, asking him "If he would extend the time until I could get the money from some work I was doing," had been specifically agreed to, instead of Beuter, as he did, replying, "you can have it six months longer," such a contract would have been void for uncertainty. *Miller v. Stem*, 2 Pa. St. 286; *Ward v. Wick Bros.*, 17 O. St. 159; *Findley v. Hill*, 8 Oregon, 247; *Hayes v. Wells*, 34 Md. 512; *Truesdell v. Hunter*, 28 Ill. App. 296; *Jenkins v. Clarkson*, 7 Ohio 76.

An agreement which can not be enforced as made, will not be enforced at all; if a usurious consideration was agreed to be paid for an extension, the consideration was void and the agreed extension not binding on either party, though otherwise a complete and valid extension agreement. *Galbraith v. Fullerton*, 53 Ill. 126; *Silmeyer v. Schaeffer*, 60 Ill. 479; *Farwell v. Meyer*, 35 Ill., page 53.

The burden of proof to show extensions to be legal, valid and binding is on the sureties, complainants in bill. *Trues-*

dell v. Hunter, 28 Ill. App. 292; Crossman v. Wohlleben, 90 Ill. 537.

A. E. DeMange, attorney for defendants in error.

A valid contract between the payee and the principal maker of a note to extend the time of payment without the consent of the sureties will release the latter. Danforth v. Gemble, 73 Ill. 170; Dodgson v. Henderson, 113 Ill. 360.

A contract to extend the time of payment of a note in consideration of interest paid in advance or a bonus or commission actually paid, even if usurious, releases the sureties. Danford v. Gemble, 73 Ill. 170; Myers v. First National Bank, 78 Ill. 257.

The contract of a surety is construed strictly and in no case can he be held beyond the terms and conditions of his contract. Dodgson v. Henderson, 113 Ill. 360.

When the payee of a note is dead and suit is brought on it at law by his administrator, the principal maker is not a competent witness in a surety's behalf in such suit to prove a contract between him, the principal, and the deceased payee, for an extension of time; which fact entitles the surety to maintain a bill in equity to enjoin the prosecution of the action at law when he has no testimony to prove the extension contract other than that of the principal. Dodgson v. Henderson, 113 Ill. 360.

In such suit in equity to enjoin the prosecution of the action at law the principal maker of the note is a competent witness to prove the extension contract made by the principal and the payee. Dodgson v. Henderson, 113 Ill. 360; Bradshaw, Adm'r, v. Combs, 102 Ill. 428.

MR. PRESIDING JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

On July 1, 1889, W. H. Gilstrap borrowed of Albert Beuter, the deceased husband of plaintiff in error, the sum of five hundred dollars and delivered to him therefor a promissory note as follows:

"\$500.

BLOOMINGTON, ILL., July 1, 1889.

One year after date we jointly and severally promise to

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pay to the order of Albert Beuter five hundred dollars at the National State Bank, Bloomington, Illinois, for value received, with interest at the rate of eight per cent per annum from date," which was signed by the borrower and also by each of the appellees—the latter being understood by the lender to be sureties only. Beuter died in January, 1892, intestate, leaving appellant, his widow, who was duly appointed administratrix, and, as such on October 25, 1892, brought a suit at law against Gilstrap and defendants in error, on said note.

Thereupon the latter filed the bill herein to enjoin its prosecution and be discharged from liability on the note, upon the ground set forth, that Beuter extended the time of payment by agreement with Gilstrap, the principal, without the consent or knowledge of complainants, the sureties; and that Gilstrap, the only person by whom such extension could be proved, was incompetent as a witness in the case at law. The answer denied that there was any valid agreement to extend the time of payment. A general replication was filed and the cause referred to the master to take and report the evidence and his conclusions. He reported in favor of complainants, and the court, upon final hearing on the pleadings and report, made a decree according to the prayer of the bill, upon which this writ of error was sued out.

The question involved is one of fact, whether Beuter did agree with Gilstrap, for a valid consideration, to give him a definite extension without the consent of his sureties.

It appears that the loan was originally made by Beuter through O. A. Shaw, his agent. Gilstrap moved to Tacoma, Washington, about six months afterward, and subsequent negotiations respecting extensions were through agents of each respectively, or by correspondence, but little of which was produced.

We deem it unimportant to consider the questions made as to the first of the alleged extensions—being for one year from the maturity of the note—because in our opinion the evidence fairly tends to show valid agreements for exten-

sion of six months from July 1, 1891, and also for a like period from January 1, 1892—the first, in consideration of the payment of \$20 in advance, on account of interest, and the last, of an agreement to keep the money for that period at the same rate and the actual payment of a *bonus* of \$500.

Gilstrap testified that at the end of the first year's extension (July 1, 1891), he wrote to Beuter and asked an extension until he could get money for some work he was doing, which Beuter granted. The answer he received was as follows:

“BLOOMINGTON, ILL., July 24, 1891.

MR. W. GILSTRAP: Found the pocket book and draft a few days after I left you. I advertised it and had to pay \$2.81 for protesting, etc., but it is all right. Please inform the bank it had been cashed here. In regard to your note will say that I do not need the money, having arranged for the purpose I wanted it for. You can have it for six months longer, and by that time if you should want it for the year it will be all right.

Very respectfully,

ALBERT BEUTER.”

And the note bears the following indorsement: “Received interest to July 1, 1891, and \$20 on interest due July 1, 1892.”

From this evidence it may reasonably be inferred that the draft referred to in Beuter's note was from Gilstrap, for the interest then due and the \$20 indorsed on account of interest to become due.

Gilstrap was an artist, but in what line or on what work he was then employed, does not appear. His request indicated no definite time, but his note was payable at one year from its date and his first extension was for one year. It is therefore not probable that he expected another for a longer period. Beuter could not know from his request just how long a time he desired, but had no reason to presume it was more than one year. The amount he received was in full for six months. He therefore accepted it as an

advance payment for that period, but added that if at the end of that period Gilstrap should want to keep the money for the rest of the year it would be "all right." That was as satisfactory to Gilstrap as a present extension for a year. He might therefore well testify that by the consent of Beuter to an extension for six months, and the promise of six months more if he should then want it, his wish was fully met and his request, though indefinite as to him, fully "granted." Hence there was no occasion for a reply accepting the offer of Beuter, if it may be called an offer. Their minds had met. Beuter so understood it, for he kept the \$20, indorsed its receipt on the note and never asked Gilstrap if it was satisfactory to him; nor did Gilstrap ever object. His silence, under the circumstances, was an acceptance.

As the six months were about to expire, he did express his wish to keep the money for the remaining six of the year, and says he sent to Beuter \$5 as a *bonus* for allowing him to do so, and received from him a card as follows:

"Bloomington, Ill., Dec. 15, 1891. To W. H. Gilstrap:—Letter and draft for \$5 received. The matter will be all right. Hope you will succeed.

Very respectfully,

ALBERT BEUTER,"

which is just what he had said in letter of July 24th; it would be, in that event, "all right."

It is not claimed that to either of these extensions the sureties or any of them consented.

Gilstrap's testimony was not contradicted in any particular. He was a competent witness. Bradshaw, adm'r, etc., v. Combs, 102 Ill. 428; Dodgson v. Henderson, 113 Ill. 360.

His request for extension implied an agreement to keep the money for the time granted and pay interest at the original rate, which was a valid consideration for it. Dodgson v. Henderson, *supra*; Crossman v. Wohlleben, 90 Ill. 537. So of interest paid in advance. Warner v. Campbell, 26 Ill. 282; Flynn v. Mudd, 27 Id. 323; Danforth v. Semple, 73 Id. 170. Even though it be usurious if actually paid and received for that purpose. *Ibid.*, and Myers v.

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First Nat'l Bank, 78 Id. 257. Any valuable consideration so paid and received will make the agreement for extension valid. Danforth v. Semple, *supra*; Montague v. Mitchell, 28 Ill. 481.

It appears that the decree was expressly based on a further extension by plaintiff in error before she was appointed administratrix and of which there was no allegation in the bill, as well as on those above stated. Evidence of such extension was introduced before the master and reported by him. The finding thereon by him and by the court, were unauthorized, and the decree so far as based thereon, was error, in all probability due to oversight; but if it was supported by proof of others given by her husband as alleged, it is not vitiated by such error. In our opinion it was so supported and will therefore be affirmed. Decree affirmed.

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### Village of Rankin v. Robert Smith.

1. MUNICIPAL CORPORATIONS—*Duty as to Streets in the Outskirts.*—The law does not require cities and villages to keep the entire width of streets and highways in sparsely settled portions, or in the outskirts of their territorial limits, in suitable and safe condition and repair for the passage of teams and vehicles.

**Trespass on the Case, for personal injuries.** Appeal from the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the May term, 1895. Reversed and remanded. Opinion filed December 10, 1895.

W. J. CALHOUN and H. M. STEELY, attorneys for appellant;  
E. R. E. KIMBROUGH, of counsel.

A city or village is not required to keep the entire width of a street or highway in its outskirts, or sparsely settled portions of its territorial limits, in suitable and safe condition or repair for the passage of teams and vehicles. Such duty only extends to the traveled part or that part of the highway which is in actual use, provided it is sufficient for



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the needs of the public. *Waugh v. Leech*, 28 Ill. 491; *Town of Havard v. Senger*, 34 Ill. App. 230; *Fritz v. Kansas City*, 84 Mo. 623; *Sykes v. Pawlet*, 43 Vt. 446; *Fitzgerald v. Berlin*, 64 Wis. 203; *Monongahela v. Fisher*, 111 Pa. St. 9; 56 Am. Rep. 241; *Keyes v. Marcellus*, 50 Mich. 439; 45 Am. Rep. 52; *City of Wellington v. Gregson*, 31 Kan. 439; 47 Am. Rep. 482; *McArthur v. Saginaw*, 58 Mich. 357; 55 Am. Rep. 687; *Perkins v. Inhabitants of Fayette*, 68 Me. 152; 28 Am. Rep. 84; *Rice v. Montpelier*, 19 Vt. 470; *Ireland v. Oswego, etc.*, 13 N. Y. 531; *Elliott on Rds. and Sts.*, p. 455 and n. 5; p. 456 and n. 1; 9 Am. & Eng. Enc. Law, 385; 2 *Dillon Mun. Corp.*, Sec. 1016 and n. 1.

It is the right of every city or village to determine what part of the highway shall be used for the various purposes of passage, as for vehicles, gutters, sidewalks, trees, etc., and upon such subject the municipal discretion must prevail. *McArthur v. Saginaw*, 58 Mich. 357; 55 Am. Rep. 687; *Detroit v. Beckman*, 34 Mich. 125; 22 Am. Rep. 507; *Cram v. City of Chicago*, 138 Ill. 506; *City of Chicago v. Apel*, 50 Ill. App. 132.

A city or village is not required to keep the margins of a highway in passable condition. *Perkins v. Inhabitants of Fayette*, 68 Me. 152; 28 Am. Rep. 84; *Mochler v. Town of Shaftsbury*, 46 Vt. 580; 14 Am. Rep. 634; *City of Wellington v. Gregson*, 31 Kan. 99; 47 Am. Rep. 482.

They are not required to light their streets at night. And failure to do so is not negligence. *City of Freeport v. Isbell*, 83 Ill. 440; *City of Chicago v. Apel*, 50 Ill. App. 132.

To render a city or village liable for an injury caused by a defect in a street, the defect must be of such a nature that it is dangerous in itself and can not be readily detected, or such that a person of ordinary prudence can not avoid danger of injury in passing it. *City of Quincy v. Barker*, 81 Ill. 300.

Where the evidence is conflicting all the instructions should be accurate, clear and perspicuous. Error in one instruction is not cured by others that are proper. *City of Hoopeston v. Eads*, 32 Ill. App. 75; *Sinnett v. Bowman*, 151

Ill. 147; *Smith v. People*, etc., 142 Ill. 118; *McClory v. Lancaster*, 44 Ill. App. 213; *D. & D. F. Co. v. McCabe*, 49 Ill. App. 453.

An instruction that a city or village is "required to use reasonable care and diligence to keep its streets in safe condition of repair," or that "it is its duty to keep its streets in reasonable safe condition of repair" is erroneous. It is only required to use reasonable diligence to keep its streets in a reasonably safe condition of repair. *City of Hoopeston v. Eads*, 32 Ill. App. 75; *City of Sandwich v. Dolan*, 141 Ill. 430.

There can be no recovery where defendant convicts plaintiff of negligence at the time of the accident. *R. R. Co. v. O'Connor*, 13 Ill. App. 62.

Where one is injured by reason of a defect in a street, he is bound to show, in an action therefor, negligence in the corporation and absence of contributory negligence on his own part. *Chicago v. Majors*, 18 Ill. 349; *Centralia v. Krouse*, 64 Ill. 19.

The fact that teams and vehicle had been passing over this street and culvert, both day and night, for years, without injury or accident, was proper for the consideration of the jury as tending to prove negligence on the part of plaintiff. *President, etc., of Fairbury v. Rogers*, 2 Ill. App. 100.

SALMANS & DRAPER, attorneys for appellee.

The authorities cited by appellant in relation to the duty of the village to keep its streets in good repair in the "outskirts," do not sustain their position. *City of McLeansboro v. Lay*, 29 Ill. App. 478; *City of Flora v. Naney*, 136 Ill. 45; *Mansfield v. Moore*, 124 Ill. 133.

It is negligence for a municipal corporation to have within its limits an open ditch crossing one of its streets at any place where the street is open and unprotected, but it is incumbent on such corporation to keep its streets in a reasonably safe condition for the whole width of the same. *Carter v. City of Chicago*, 57 Ill. 286; 2 *Beach on Public*

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Village of Rankin v. Smith.

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Corporations, 1451; Monongahela City v. Fisher, 111 Pa. St. 9.

MR. PRESIDING JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

Rankin is an incorporated village with a population of about four hundred, and includes the E.  $\frac{1}{4}$  of E.  $\frac{1}{4}$  of section 11 and the W.  $\frac{1}{4}$  of W.  $\frac{1}{4}$  of section 12 in T. 23 N., R. 14 W. of the 2d P. M., in Vermilion county. Main street is a continuation of a country highway coming in from the south, extending north through the village. At its entrance it intersects at right angles Fifth avenue, which is at the extreme south end of the village plat. The house on it nearest the intersection is a block away, north of it, and east of Main is an open common. The photographs in the record give to neither any appearance of a village street, but to each that of a country road, with level, unobstructed and well-worn traveled wagon ways of the usual width in the middle. On the east side of Main and across the traveled part of Fifth avenue was a box culvert, about a foot square and fourteen and a half feet long. The ditch from the south end of it was filled up by washings from the south, so that the whole street south of its north end, being forty-six feet in width, was level, convenient and safe for driving. But north of the north end the ditch, about ten inches deep, was open.

Appellee and Henry C. Wright, living some miles south of the village, on an evening of November in 1893, were rapidly driven by a boy about seventeen years of age, in a two-horse top buggy, into the village, to take the 7:12 P. M. train for Chicago. To make it they had to go eight and a half miles and stop at two places in the village in one hour and seventeen minutes. The ground had been frozen but it had rained during the day and thawed a little on top. It also rained or misted during their drive and became very dark before they reached Rankin. Appellant and Wright were well acquainted with the two streets at and about their intersection and with the culvert, but the driver was not.

Their intention was to turn east on Fifth avenue. They told the driver to turn there. Appellee said it was too dark to see the culvert, but Wright says he could see and warned the driver that he was going to miss it. He had been driving fast, but when directed to turn he suddenly slowed and made almost a square turn. His right wheels went over the culvert but the left went into the ditch. He was sitting on the knees of the men, and the sudden check threw him out over the left front wheel, carrying the lines. The team became frightened and started to run; appellee jumped out and so fractured the fibula of one leg about three inches above the ankle joint. Wright remained in the buggy and the team stopped about two blocks east.

Appellee was confined to the house about a month, suffered the pain usually incident to such a fracture, and expended for treatment \$52.

For the injury thus sustained he recovered in this action a judgment upon a verdict for \$126, which was certainly little enough if he was entitled to anything.

Whether the village authorities failed to use ordinary care to keep the street, at the place of the accident, in reasonably safe condition for persons exercising a like ordinary care in the use of it, was the one question in the case.

Their duty to use such care to keep in such condition, to the extent of their entire width, streets which the necessity or convenience of the public requires them to use to that extent has been often declared by the courts and is unquestioned. But the street here in question, though within the corporate limits, was in fact clearly not such. For its use by vehicles it was confessedly all that it should have been—plain, wide and smooth enough to meet every reasonable requirement of necessity or convenience. Appellee had not the least occasion or intention to use it any further or in any other way than it was plainly intended by appellant and well fitted to be used. He knew its actual condition and the extent to which it was so fitted and intended. His failure so to use it was due to the unusual darkness of the night and his neglect to keep the lookout

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thereby required and direct the ignorant driver to turn east before he had driven quite so far north on Main street.

The case presents the question whether the authorities of a village are bound to use any effort to keep all the streets within its limits reasonably safe for vehicles to the full extent of their width, without regard to the extent of their actual occupation for residence or business purposes.

So far as we are advised it has not been definitely settled by the Supreme Court of this State. Counsel for appellee have referred us to no authority, here or elsewhere, and hesitate to oppose the reversal of the judgment below because of the meager damages awarded; but counsel for appellant cite many cases from other States, and some from the Appellate Court of Illinois, which more or less directly support the negative. Since these have not been noticed by counsel for appellee, we are not disposed to lengthen this opinion by any review of or further reference to them. We are of opinion that no negligence on the part of the defendant was shown by the evidence, and, if there was, so much contributory negligence on that of the plaintiff was also shown as should bar his right to recover. The instructions given for him, in our opinion, went further than the law required in reference to the duty of the appellant in respect to streets of the character of the one in question, and the verdict should have been set aside as against the law and the evidence. The judgment will therefore be reversed and the cause remanded.

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**Edward Covington and Mary Covington v. James Sink,  
John Brown, William Brown and  
Robert Coultas.**

1. *CONTRACTS—Reciprocal Obligations.*—Under a contract imposing obligations upon the parties which are reciprocal, continuous, and constitute as to each party the consideration for those assumed by the other, neither party, while persistently refusing or neglecting to comply with

the obligations imposed upon such party can rightfully insist upon the performance by the other of the obligations imposed upon him.

**Assumpsit**, upon a contract in writing. Appeal from the Circuit Court of Morgan County; the Hon. CYRUS EPLER, Judge, presiding. Heard in this court at the May term, 1895. Affirmed. Opinion filed December 10, 1895.

GEORGE W. SMITH, attorney for appellants.

H. G. WHITLOCK and J. SULLIVAN, attorneys for appellees.

MR. PRESIDING JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

On appeal from a justice of the peace appellees, plaintiffs below, recovered judgment upon a verdict for \$104.60.

The claim was for work done by them under a written contract between the parties of May 31, 1893, whereby, among other things, it was agreed that appellees would put in operation a saw mill upon the premises of appellants as soon as practicable, and cut, haul and saw into lumber all the saw timber thereon that was fit to make good lumber, and so situated as to be conveniently deliverable at the mill, for eighty-five cents per one hundred feet; that appellees might sell all they could dispose of, and that the proceeds of all lumber sold by them or by appellants should be paid to appellees, until all the amount of the chopping, hauling and sawing should be fully paid.

The defense set up was, that appellees quit the work, leaving a considerable portion of the timber uncut; to which it was replied that appellant, Edward Covington, sold and received the price for lumber that appellees sawed, and persistently refused to turn it over to them upon request, and after notice from them that, unless he did, they would quit the work and bring suit for what they had done; and that appellants also refused to give them lumber for the amount so sold, except at an exorbitant price.

It appears that the mill was put in operation early in June and ran for something more than a month, during

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which it sawed about 60,000 feet, leaving, as claimed by appellants, from thirty to thirty-five thousand unsawed.

It was not denied that Edward Covington did receive about fifty dollars for lumber that he sold, which he did not turn over according to the contract, or that he was repeatedly requested by appellees to do so, and notified of the consequences of his failure, as stated. His excuse, as given on the trial, was that he needed the money to buy provisions for appellees' hands, whom he agreed to board, but it is not claimed that such excuse justified him under the contract; which is the only documentary evidence shown by the abstract.

The only testimony of any importance, so far as we can see, excepting that of several witnesses tending to impeach the general reputation of appellants for truth and veracity, came from the parties, and in some respects was conflicting. But the controlling question in the case is fairly presented by the reliance of appellants upon the point that the contract was an entirety, and therefore that appellees could not rightfully recover without proof of its full performance on their part. Hence, the chief complaint is of its alleged construction by the court. By the abstract we are not advised of that construction. It omits much of the evidence, on the ground that any abstract of it would be too expensive to justify it, and we are therefore referred to the record for all knowledge of it; and, while complaining of the instructions given for plaintiffs, and of the modification of those asked by the defendants, it fails to present a single word of either. In short, it is not at all in compliance with the rule of this court, and the judgment might well be affirmed for that reason.

The contract plainly imposes obligations upon the parties to it, which are reciprocal, continuous, and constitute as to each the consideration for those assumed by the other. We do not understand that either, while persistently refusing or neglecting to comply with those imposed upon it, can rightfully insist upon performance by the other of those so assumed by it. *Harber Bros. Co. v. Moffett Cycle Co.*, 151 Ill. 84; *Bradley v. King*, 44 Id. 339.

As to the amount of the balance due to appellees, the finding of the jury, strengthened by the refusal of the court to disturb it, must be regarded as conclusive. The judgment will therefore be affirmed.

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**Village of Sciota v. Samuel B. Norton.**

1. **NEGLIGENCE—*Defective Sidewalks.***—It is the duty of a city to keep its sidewalks in reasonably safe condition for persons to travel over.

**Trespass on the Case, for personal injuries.** Appeal from the Circuit Court of McDonough County; the Hon. CHARLES J. SCOTFIELD, Judge, presiding. Heard in this court at the May term, 1895. Affirmed. Opinion filed December 10, 1895.

BAILEY & HOLLY and NEECE & SON, attorneys for appellant.

L. F. MEEK and AGNEW & VOSE, attorneys for appellee.

MR. PRESIDING JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

On the 19th of February, 1892, appellee, on his way home from his office, was joined by his nephew, whose stepping up beside him caused a plank on the sidewalk to fly up, tripping and throwing him down, whereby his arm was broken. For the injury so sustained he recovered judgment below in this action upon a verdict for \$392.67.

The only question in the case is as to the alleged negligence of appellant in respect to the sidewalk.

It was made of pine boards about five inches wide and three feet long, laid crosswise upon two stringers, each about three or four inches from the ends of the boards, and had been built about two years before the accident.

It appears that some of these boards had become loose and were thrown out by appellee and others, indicating that



the defect was in the stringers. About two weeks before the accident the street commissioner and two assistants went over the walk, examined it, and attempted to fix the bad places in it by nailing on the boards. Their attention was called to the stringers, which they found "not right sound," but they thought they would hold the nails and took the chances. Under proper instructions as to the law, the jury found that this was negligence, and the court refused to set aside their finding. We think it is not our province to do so, though the proof of negligence may seem slight. The judgment is affirmed.

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**Cleveland, C., C. & St. L. Ry. Co. v. Walter Dunn.**

1. **CORPORATE LIMITS—Presumptions as to in Collateral Proceedings.**—Corporate limits, when involved in a suit against a railroad company for killing domestic animals, are presumed to embrace all territory within the actual limits and over which the city exercises jurisdiction for city purposes under claim of right to do so.

2. **SAME—Not to be Determined in Collateral Proceedings.**—A court can not, in a suit against a railroad company for an alleged killing of domestic animals within the limits of a city, determine whether or not the city has lawfully exercised its power to extend its boundaries. Such matters can be determined only in a direct proceeding.

**Trespass on the Case, for killing domestic animals.** Appeal from the Circuit Court of Coles County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the May term, 1895. Affirmed. Opinion filed December 10, 1895.

GEORGE F. McNULTY and NEAL & WILEY, attorneys for appellant.

JAMES W. CRAIG, attorney for appellee.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment rendered in favor of the appellee for the value of a mare which was struck and killed by a train of the appellant company.

One count in the declaration charged the animal was in the city of Charleston when killed, and that the train was running at a higher rate of speed than was lawful under an ordinance of the city.

The only matter in dispute under this count was whether the place where the mare stood when she was struck by the engine is in the limits of the city, in all other respects liability being fully established by the proof.

She was standing at the time upon a crossing of one of the streets of the city and the track of the railroad, but the appellant contends the street is located upon a strip of ground adjoining but outside the boundary line of the city as established by the charter under which the city is organized, and that the strip has not been legally annexed to the city.

It was proven, and without contradiction, the city obtained possession of the strip in question nearly thirty years ago, and then made a street upon it, and has since then worked and maintained the street and devoted it to public use as a street, and that it became and was a part of the city in point of fact.

The crossing in question was within the *de facto* limits of the city, and the regularity of its annexation can not be raised or determined in such an action as the one at bar, but only in a direct proceeding.

Nor can the court in a case such as the one at bar determine whether or not the city had lawfully exercised its power to extend its boundaries.

The general statutes of the State authorize the organization of cities, towns and villages, and empowers such corporations to make additions to their territory; and here we find a *de facto* city.

The validity of its organization or of the manner in which it extended its boundaries can not be determined in such an action, but the conclusive presumption obtains that the *de facto* city is a city *de jure*, and its *de facto* limits are its limits *de jure*.

Corporate limits, when as here involved, are presumed

to embrace all territory within the actual limits and over which the city exercises jurisdiction for city purposes under claim of right to do so.

Speaking upon the point the Supreme Court of Iowa, in the case of *The City of Albia v. O'Hara*, 5 Amer. & Eng. Corp. Cases, p. 326, said: "We can not try the legality of the proceeding (to annex territory) in a case like this. Whatever territory the city maintains jurisdiction over must be regarded, we think, *de facto* corporate territory. If the right of jurisdiction is to be tested it should be done by a proceeding that would be binding upon all, and final. The judgment must be and is affirmed."

This opinion is rendered upon a petition for a rehearing. The opinion upon which a rehearing was asked was open to the construction that the presumption a city has lawful right to exercise jurisdiction within its *de facto* limits, is *prima facie* only, and a rehearing was asked in order that counsel might be heard to direct the attention of the court to a special charter, granted the city of Charleston, by, as counsel contend, a "public act" of the general assembly, certain clauses of which act counsel insist operate to overcome such *prima facie* presumption.

We observe this charter authorizes the extension of the corporate limits under certain circumstances and the conclusive presumption arises it extended its limits in accordance with such provisions or under the provisions of the general statutes of the State authorizing the annexation of territory by an incorporated city, town or village, whether incorporated under the general law or by a special statute.

Entertaining the views as expressed in this opinion, that the validity of the act of the city in extending its *de facto* limits can not be raised or determined in this proceeding, we have denied the motion for a rehearing, and in order that no misapprehension may exist as to our judgment of the rule of law involved, have caused this opinion to be substituted for the former opinion in the case. Judgment affirmed.

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### Katheryne S. Smith v. Edward O. Smith et al.

1. **ADMINISTRATION OF ESTATES—*Proceeds of Sales in Partition.***—A decree of the Circuit Court, ordering the sale of real estate for the purpose of accomplishing a partition among those owning it as tenants in common, does not have the effect of converting the proceeds of such sale into personal assets of the estate of the ancestor.

2. **SAME—*Money Arising from Sales in Partition Treated as Real Estate.***—Money in the master's hands, arising from a sale of real estate in partition, is impressed with the character of realty, and retains all the qualities of real estate so far as either administrator or creditor of the ancestor is concerned. It is a subject to be dealt with only as real property.

3. **SAME—*Judgment in Favor of an Administrator Appointed Under the Laws of Another State not Competent Here.***—A judgment rendered in California against an administrator appointed under the laws of that State, is not competent evidence to show a right of action against an administrator appointed under the laws of this State to administer upon the assets of the same decedent in this State.

**Proceedings for Partition and Dower.**—Appeal from the Circuit Court of Macon County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the May term, 1893. Affirmed. Opinion filed January 11, 1896.

W. C. JOHNS, attorney for appellant, contended that the property of Edward O. Smith, wherever situated, is liable for the payment of his debts.

The allowance for the support of his widow is a debt. Statutes of California, Secs. 11464, 11465, 11466, 11467.

The funds in the hands of various officers of court must be regarded as personalty, converted into such for the purpose of paying debts. 3 Pom. Eq. Jur., Sec. 1159; *Beach v. Simmons*, 18 S. W. Rep. 933; *Foster v. Foster*, 1 Ch. Div. 588; *Cooke v. Dealey*, 22 Beav. 190; *Oberly v. Lerch*, 18 N. J. Eq. 346; *Heydock's Appeal*, 7 N. H. 496; *Cronise v. Hardt*, 47 Md. 433; *Davis v. Estey*, 8 Pick. 476; 2 Wern., Adm., Secs. 481, 562; *Porter v. Heydock*, 6 Vt. 374; 2 Kent Com. 433; *Steed v. Preece*, 18 L. R. (Eq. Cas.) 192; *Robinson's Appeal*, 62 Pa. St. 213; *Emerson v. Cutler*, 14 Pick. 118.

The administration in California is principal, and the administration of the funds in Illinois, whether conducted by an administrator or by a court of equity, is ancillary. *Young v. Wittenmyre*, 123 Ill. 307; *Heyer v. Alexander*, 108 Ill. 386; *Young v. Young*, 21 N. Y. St. 1008; S. C., 2 Misc. Rep. 381; *Mackey v. Cox*, 18 How. (U. S.), 105; 3 Redf. Wills, \*26 *et seq.*; *Churchill v. Boyden*, 17 Vt. 319; 3 *Williams Ex'rs*, 1664.

Personalty is governed in distribution by the law of the domicile. *Parsons v. Leyman*, 20 N. Y. 112; *Despard v. Churchill*, 53 N. Y. 197; *Young v. Wittenmyre*, 123 Ill. 307; *Stevens v. Gaylord*, 11 Mass. 256; *Fay v. Haven*, 44 Mass. 114; *Dawes v. Boylston*, 9 Mass. 337; *Jenison v. Hapgood*, 27 Mass. 79; *Wheelock v. Pierce*, 6 Cush. 288; *Richards v. Dutch*, 8 Mass. 514; *Heydock's Appeal*, 7 N. H. 496.

After domestic creditors are paid, property should be remitted to the place of principal administration. *Young v. Wittenmyre*, 123 Ill. 307; *Stevens v. Gaylord*, 11 Mass. 256; *Mackey v. Cox*, 18 How. (U. S.) 107; 3 Redf. Wills, \*26 *et seq.*; *Churchill v. Boyden*, 17 Vt. 319; *Fay v. Haven*, 3 Metc. 109; *Wheelock v. Pierce*, Cush. 288; *Richards v. Dutch*, 8 Mass. 514; 3 *Williams' Exrs.* 1664; *Walker v. Welker*, 25 Ill. App. 123; *McDonald v. McDonald*, Adm'r, 28 S. W. 482; *Mays v. Equitable, etc., Ass'n*, 15 So. R. 791; *Cass v. U. S. Trust Co.*, 30 N. E. Rep. 125; *Despard v. Churchill*, 53 N. Y. 197.

A question determined by the courts of a sister State, so far as to become *res judicata* between the parties, can not be reopened by the same parties in another State. *Dawes v. Head*, 3 Pick. 128, 147; 1 Wern., Adm., Secs. 158, 167, *et seq.*

CREA, EWING & WALKER, also attorneys for appellant.

BUNN & PARK and OUTTEN & PAGE, attorneys for appellees.

The attempt to have the allowance made to appellant as

widow, under the laws of California, paid out of the proceeds of the sale of lands in Illinois, is an attempt to distribute the real estate in Illinois according to the laws of the State of California, which can not be done.

An award is only allowed to one who is a resident of this State. Vol. 1 Starr & Curtis' Stat., page 223; Veille, Adm'r, v. Kock, Guar., 27 Ill. 129-132.

Even an award made to a widow in this State may be contested. Marshall v. Rose, 86 Ill. 374.

The property was not converted into personalty for the payment of debts, but for division among the owners, and the conversion was not made as estate property but as the property of the heirs.

These funds arise from the real estate in the State of Illinois of which E. O. Smith died seized. Such real estate descended to the heirs *eo instanti* of the death of their father. Any change from real estate has been since made by them through the aid of the court, and as of their own property and not the property of the estate. By the reduction of their land to money in this way it no more becomes the personal property of the estate than would the sale by any one of them of the lands set off to him on partition render the proceeds of such sale the personal property of said estate. In re Chapin, 148 Mass. 591; Simonds v. Simonds, 112 Mass. 157; 3 Pom. Eq. Jur., Sec. 1167; Howard v. Peavy, 128 Ill. 430; Holland v. Cruft, 3 Gray 162; Emerson v. Cutter, 14 Pick. 118; 3 Wash. R. E. p. 6; Smith v. McConnell, 17 Ill. 135; Horner's Prob. Law, Sec. 172, p. 200; Story's Conflict of Laws, Sec. 428, 430, 431, 435, 483, 551 and 555; 1 Red. on Wills, (4th Ed.) 398.

It does not make much difference whether the administration here is termed ancillary, principal or independent, because we think the law is well settled that each administration is so far independent that each State controls the assets within its territory according to the peculiar circumstances of each case, especially if it is real estate or the proceeds of real estate.

Not being personal estate it should not be distributed

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according to the laws of California, but according to the laws of Illinois. Real estate is governed by the *lex rei sitæ*. See Story's Equity, Vol. 1, Sec. 586; McGarvey v. Darnell, 134 Ill. 373; Judy v. Kelly, 11 Ill. 214; Rosenthal v. Renick, 44 Ill. 202; Stacey v. Thrasher, 6 How. 44; Hill v. Tucker, 13 How. 46; McLean v. Meek, 18 How. 16; Freeman on Judgments, Secs. 163, 572.

The doctrine is well settled, that the administration in one country or State only affects the assets within its limits. Freeman on Judgments, Secs. 13, 18.

This applies even to a judgment although personal estate, which is directed to be applied in a certain way by the law of the State where recovered. McDonald v. McDonald, 28 S. W. Rep. 482.

The condition of the property at the time of its descent determines its status, the rights of the heirs being considered as arising at the death of the ancestor. 2 Washburn on Real Property, 408, Sec. 32, star p. 413.

The surplus or excess under administrator's sale goes to heirs, devisees, owners, etc. 1 Starr & Curtis' Stat., 237.

The grant of \$3,850 made by the Superior Court of Santa Clara County, California, to appellant as widow of E. O. Smith, is only effective as to property in that jurisdiction. It is not only not *res judicata* in this State, but it is not even sufficient to establish the *prima facie* right of the claimant in a court of this State without further proof. McGarvey v. Darnell, 134 Ill. 367; Story on Conflict of Laws, Sec. 522; Freeman on Judgments, Secs. 163, 572; Jones & Cunningham's Probate Practice, Sec. 5, p. 206; Stacey v. Thrasher, 6 How. (U. S.) 44; Judy v. Kelley, 11 Ill. 211; Rosenthal v. Renick, 44 Ill. 202; McLean v. Meek, 18 How. (U. S.) 16.

## OPINION PER CURIAM.

Edwin O. Smith, a resident of California, died in that State intestate.

Katheryne S. Smith, the appellant, his widow, was granted

letters of administration on his estate in California and obtained an order or judgment in the Superior Court of Santa Clara County, California, that she "be allowed out of the estate of the deceased as and for a 'family allowance' \$250 per month for a certain period and \$200 per month for another period (making a total sum of \$3,850), 'to be paid out of the estate of said decedent in preference to all other claims except funeral expenses and costs of administration.'"

Claims in favor of other creditors were allowed in the courts of California.

The decedent owned property, both real and personal, in Illinois, where administration upon the estate was also had and all demands there exhibited paid.

The claims allowed in the court in California remained unpaid except so far as discharged by the decree of the Circuit Court in Illinois, in the proceeding from which this appeal was taken. The children and heirs of said deceased, the appellees herein, filed a bill in chancery in the Macon County, Illinois, Circuit Court, for partition of the lands owned by him in Illinois at the time of his death, and for the assignment of dower therein to the appellant, his widow. Decree as prayed was rendered and commissioners were appointed to make partition and assign the dower. They reported a partition and assignment of dower as to all the real estate except that known as the "Opera House property" in Decatur, which they reported not susceptible of partition among the respective owners.

Thereupon in pursuance of the statute in such case provided, in order to accomplish a severance of the interest of the tenants in common in said opera house property, the court decreed it to be sold free of dower, the appellant having assented in writing to receive in lieu of dower, an amount to be fixed by the court out of the proceeds of the sale.

The master in pursuance of the decree sold the property, paid the appellant the amount allowed her for her dower interest therein, and there still remained in his hands arising from the sale \$13,073.32. There was also in the hands



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of a receiver appointed by the court during the pendency of the partition proceeding \$320.13 arising from collections of rents upon the real estate.

The court was asked upon an agreed statement of facts to apply the moneys in the hands of the master and receiver or a sufficient amount thereof to the payment of the claims against the estate of the ancestor as allowed by the court in California, and the payment of a number of claims was ordered to be made by the master, but the court refused to order payment to the appellant of the amount allowed her for "family allowance" hereinbefore mentioned. She excepted to such action of the court and in her individual capacity has prosecuted this appeal to this court.

The only question arising upon the record is whether the court should have ordered payment to be made of the claim in favor of the appellant for family allowance under the statutes of California.

The real estate situate in Illinois of which Edwin O. Smith died seized, upon the instant of his death descended to the appellees, subject to the right of dower resting in appellant.

The rents in the hands of the receiver accrued after the death of the ancestor and during the pendency of the suit, and became absolutely the property of the heirs as against the administrator. *Phelps v. Funkhouser*, 39 Ill. 401.

The title to the opera house property vested in the appellees in fee, subject to the dower interest of the appellant. The decree of the court ordering it to be sold did not convert the proceeds of the sale into personal assets of the estate. It was not converted into money for the purpose of repaying the debts of the ancestor but for the entirely different purpose of accomplishing a partition of the property among those owning it as tenants in common, a course resorted to only because the property could not be subdivided, and the interest of each owner allotted to him or her in severalty.

The interest of the appellant as widow in the proceeds produced by the sale was that of dower in real property, not

the descendible interest in personalty granted by the statute to a widow. In this view she was awarded such proportion of the proceeds as the court decided to be the value of her dower interest, and she accepted and was paid that sum as in lieu of her dower in the property which had been sold.

The money in the master's hands arising from the sale was impressed with the character of realty and retained all the qualities of real estate so far as either administrator or any creditors of the ancestor were concerned. It was as to them subject to be dealt with only as real property.

It is well settled a judgment rendered in California against an administrator appointed under the laws of that State is not competent evidence to show a right of action against an administrator appointed under the laws of this State to administer upon the assets of the same decedent in this State. *McGarvey v. Darnell*, 134 Ill. 369.

In the case cited it was ruled such a judgment did not establish even *prima facie* the validity of the claim upon which it was founded for the purpose of subjecting real estate in Illinois to its payment. In the case at bar the heirs appeared in the court in California, filed an answer in opposition to appellant's claim, introduced evidence in support of the answer, were fully heard by counsel and became bound by the adjudication as fully as the rules of law would operate to conclude them in such a proceeding. Counsel for appellant insist the heirs having so appeared as parties in the court in California, the question of the validity of appellant's claim is *res judicata*. This contention seems to be disposed of; at least we feel concluded as to it by an expression of the court in *McGarvey v. Darnell*, *supra*, wherein, speaking of the effect of a judgment rendered against an administrator in Iowa, it was said:

"Moreover, that in regard to which the Iowa court had jurisdiction to adjudicate was the property in that State, and that only; and when it assumed to adjudicate that the demand of the claimant was a just charge upon the estate of the deceased, such adjudication had reference solely to property in that State, and was efficacious in respect to that property only."

So it would seem all that was adjudicated by the proceeding in California was as to the validity of appellant's claim as a just charge upon the property of the decedent in that State.

If this view of the question is the correct one the transcript of the proceedings and judgment in the court of that State would avail the appellant nothing in the proceedings in this State to establish the validity of her claim as a charge upon the real estate of the heirs in this State.

Her claim here must be made out by competent proof of all the facts necessary to support it. The allowance provided for by the California statute is a family allowance.

The amount thereof must necessarily be dependent among other things upon the number of persons constituting the family, the age of such persons, the expenses of maintaining them, etc., as to all of which nothing appears in the record.

That the amount of such allowance is so dependent upon some such considerations and possibly upon others which do not now occur to us, is manifested by the fact the California court awarded the appellant the sum of \$250 per month for a designated period and the sum of \$200 per month for another period, presumably because of a change occurring in the membership of the family or in the age of some of its members, or otherwise in the circumstances or condition of the family.

However that may be, the Circuit Court, in the absence of competent proof to support the claim, properly refused to order the master to pay it.

The decree is affirmed.

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63	541
162	43

### John M. Fullerton v. Joseph H. Morse.

1. *REPLEVIN—Parties, Agent of a Mortgagee.*—A person who is appointed by the mortgagee as an agent to take possession of the mortgaged chattels and foreclose the mortgage, can not maintain an action of replevin for such chattels in his own name.

2. *STATUTES—Construction of.*—The language of Sec. 1, Chap. 119,

R. S., entitled "Replevin," providing that whenever any goods or chattels shall have been wrongfully distrained, or otherwise wrongfully taken, or shall be wrongfully detained, an action of replevin may be brought for the recovery of the same by the owner or person entitled to their possession, is declaratory of the common law and intended to distinguish, from the absolute owner, a person having a qualified or special interest, legal or equitable, in the property itself.

**Replevin.**—Appeal from the Circuit Court of DeWitt County; the Hon. GEORGE W. HERDMAN, Judge, presiding. Heard in this court at the May term, 1895. Affirmed. Opinion filed December 6, 1895.

MOORE & WARNER, attorneys for appellant, contended that, the appellant having been appointed by the mortgagee to foreclose the mortgage and take possession, sell the property, and distribute the proceeds thereof in pursuance of the terms of the mortgage, and the note and mortgage having been delivered to him by the mortgagee for that purpose, he was entitled to the possession of the property in controversy, and can maintain this action in his own name. Sec. 1, Ch. 119, R. S. Ill.; *Tyler v. Freeman*, 3 Cush. 261; *Williams v. West*, 2 Ohio St. 83; *Johnson v. Carnley*, 10 N. Y. (6 Selden), 578; *Rich v. Riley*, 105 Mass. 306; *First Nat'l Bank v. Crocker*, 111 Mass. 163; *First Nat'l Bank v. Dearborn*, 115 Mass. 219; *Gordon v. Farrington*, 46 Mich. 420; *Coats v. Farrington*, 46 Mich. 422; *Cagill v. Wooldridge*, 8 Bax. (Tenn.) 274.

R. A. LEMON, E. J. SWEENEY and GEORGE K. INGHAM, attorneys for appellee.

No one can bring an action for a tort except the person whose right has been interfered with. *Dicey on Parties to Actions*, 347.

However, when an agent has an interest in the subject-matter of the agency, as when he has a lien on the proceeds of sale, he may sue in his own name. *Girard v. Taggart*, 5 S. & R. (Pa.) 27; *Minturn v. Main*, 7 N. Y. 220; *First Nat'l Bank v. Crocker*, 111 Mass. 163.

Also, an auctioneer agent, who is responsible to the owner, may have replevin for goods committed to his possession

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for the purpose of sale; this being a special property sufficient to maintain the action. *Tyler v. Freeman*, 3 Cush. 261.

Also, an actual possession of property by an agent, coupled with an equitable interest therein at the time of seizure is sufficient to maintain replevin. *Johnson v. Carnley*, 10 N. Y. (6 Selden) 578.

Only one, being a general or special owner of property, can maintain replevin for it. *Williams v. West*, 3 Ohio St. 83.

In this State the interest of the mortgagor, before default, may be seized on execution, when the mortgage provides that the mortgagor shall retain possession until the condition is broken. *Beach v. Derby*, 19 Ill. 617; *Simmons v. Jenkins*, 76 Ill. 479.

MR. PRESIDING JUSTICE PLEASANTS DELIVERED THE OPINION  
OF THE COURT.

This was an action of replevin brought against appellee, a constable who had levied on the property in controversy, under process against the mortgagor in possession and before condition broken. By stipulation of the parties it was tried without written pleadings and by the court, without a jury. The issues were found and judgment given for the defendant.

It appears that after the levy was made, which was a breach of the condition of the mortgagor's right to retain possession as against the mortgagee, and authorized a foreclosure, the plaintiff was appointed by the mortgagee, Mrs. Sarah D. Swayne, a resident of McLean county, to take possession and sell, under the provision of the mortgage, which was, that in case of breach of the conditions it should be lawful for the mortgagee or her "agent or attorney, her heirs, executors or administrators," to take possession of said goods and chattels, to and for the use of said mortgagee, etc., and that "the exhibition of this mortgage shall be sufficient proof that any person claiming to act for the mortgagee, is duly made, constituted and appointed agent and attorney to do whatever is above authorized."

It is not claimed that appellee wrongfully took the chattels in question. He was a constable *de jure*. His executions were regular, and the mortgagor had such an interest as made them liable to the levy. But appellant exhibited to him the mortgage, and note secured by it, and demanded the goods of him in writing; and it is said that he thereby became "entitled to their possession," so that the refusal to deliver it was a wrongful detention, and he could maintain this action in the *detinet* under the statute—R. S., Chap. 119, Sec. 1. Whether he was shown by the evidence to be so entitled is the only question in the case.

It is substantially conceded that his title was not such as the common law required to maintain the action in his own name. He had never been in possession, even as agent, and therefore was never responsible for it to anybody. He made no claim of property, general or special, or any interest, legal or equitable, in the goods themselves. He testified that "he had no personal interest in the property," nor any more authority as agent than that conferred in the manner and to the extent above stated. That empowered him to foreclose for the benefit of his principals, and in her name—not otherwise. She could not sever her right to foreclose from her interest in the property, and transfer it, naked, to another. But in his written demand and these subsequent steps, he wholly ignored her and proceeded in his own name, and as in his own personal right. He was responsible to her only for the performance of his duty as agent, and interested only in the compensation for his services as such.

We are of opinion that the language of the statute—"or person entitled to their possession"—is declaratory of the common law and intended to distinguish from the absolute owner, a person having a qualified or special interest, legal or equitable, in the property itself. Upon the facts here shown, the judgment was right, and will therefore be affirmed.

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Loucks v. Paden.

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**Mary Loucks v. Robert N. Paden, Adm'r, et al.**

1. **WITNESSES—Incompetency of, When Removed.**—Where a person defends as the administrator of a deceased person, the adverse party is not a competent witness, but becomes competent where any person having a direct interest in the event of such action testifies therein on behalf of such party so defending to conversations and transactions occurring between such adverse party and the deceased.

2. **PARTNERSHIP—The Fact, How Established.**—The existence of a partnership may be established by circumstantial evidence.

**Bill in Chancery.**—Settlement of partnership matters. Appeal from the Circuit Court of Montgomery County; the Hon. JACOB FOUKE, Judge, presiding. Heard in this court at the May term, 1895. Reversed and remanded with directions. Opinion filed January 11, 1896.

**STATEMENT OF THE CASE.**

This was a bill in chancery filed by appellant, in which she alleged that she and one Margaret A. Tinnin, from about the year 1886 to January, 1892, were partners, engaged in selling notions and small articles in the city of St. Louis, Mo.; that they were both deaf mutes; that they accumulated a partnership fund which they kept in money, at their room at 300 South Broadway, St. Louis, in a trunk belonging to said Margaret A. Tinnin, because her trunk was stronger and more secure in its fastenings than the trunk of appellant, that the money in said trunk was the joint earnings of appellant and said Tinnin.

That in February, 1892, said Margaret A. Tinnin, who had for two years previous been in poor health, was taken seriously ill and was removed by her friends to Litchfield, Illinois; that appellant also went to Litchfield to assist in the care of said Tinnin; that the said trunk of Margaret A. Tinnin containing the partnership moneys therein was taken to Litchfield, and that said joint earnings and partnership money amounted to \$1,400, being the accumulations of six years partnership business; that appellant and said Tinnin frequently conversed about said money in the sign language;

that the money was to be equally divided; that appellant would have to receive \$700.

That said Margaret A. Tinnin died intestate March 7, 1892, leaving certain heirs named in the bill; that Robert N. Paden was, on March 9, 1892, appointed administrator of her estate by the County Court of Montgomery County, Illinois; that he took possession of said trunk including the said \$1,400; that appellant applied to said administrator for her one-half of said money, but he refused to give it to her claiming that the money was the exclusive property of said Tinnin, and will distribute same to the legal heirs of said Tinnin.

Prayer of bill is to have said money decreed to be partnership property, and said administrator be ordered to deliver one-half thereof to the complainant. The defendants answered denying the alleged partnership and claiming all the money belonged to Margaret Tinnin. The cause was referred to the master, to take and report the proof, and was submitted to the court upon the testimony taken before and reported by the master, and upon the deposition of witnesses taken in St. Louis.

The court found the complainants had not supported her case by the proof, and dismissed the bill, from which decision she appealed to this court.

W. A. HOWETT and AMOS MILLER, attorneys for appellant.

R. McWILLIAMS and JAMES M. TRUITT, attorneys for appellees.

OPINION PER CURIAM.

Only questions of facts arise herein.

They are stated by counsel for appellee to be—

First. Were the complainant and said Maggie Tinnin partners?

Second. If they were partners is the money in dispute partnership funds?

It must be determined whether the testimony of the ap-



## Loucks v. Paden.

pellant can be considered. She was in the first instance not competent to testify to facts which occurred during the lifetime of Mrs. Tinnin.

Her testimony touching fully upon her business dealings and connections with the deceased was taken by the master and much of it under the rule was incompetent, but afterward appellee introduced several witnesses, heirs of the decedent, and as such interested in the suit, who testified to conversations and transactions which, as they alleged, occurred between appellant and the deceased. The statute permitted appellant to testify as to such transactions or conversations, and thus much of her testimony which otherwise should have been rejected from consideration became competent. Even if all her testimony be excluded we think the existence of a copartnership abundantly proven.

Patrick Coughlin testified substantially as follows :

"I am forty-five years old; live at 1248 Carr street, St. Louis; got acquainted with Maggie Tinnin and Mary Loucks about eleven years ago at 1236 N. Broadway, wholesale supply house; they came to my house to buy laces, with a note from the house of Rice, Stix & Co., telling me what they wanted; they both came together; Maggie's health was delicate from the first day I saw her; they were both deaf mutes. I communicated with them in writing; Mary Loucks would buy the goods and Maggie would pay the bill; Maggie would sit in the coolest place we could get, and the goods would be brought to her and she and Mary would examine them and when satisfied they would go into the pile of things they wanted to buy. Maggie told me they were partners. Many a day Maggie would come to the house alone to buy goods, and when I asked her where her partner was, she would tell me in such and such place; then she used to come and buy goods and would ship them to Mary in different parts of Missouri, and she would remain here. I would get letters from them ordering so much goods, and the goods were always shipped to Mary Loucks.

"The letters were always written and signed by Mary Loucks; the returns were sent by Mary Loucks. All that

Maggie Tinnin told me was they were partners. About eight years ago the express drove to the door with a trunk with Mary Loucks' name on it; after awhile Maggie and Mary came in; they said they were going to buy a nice bill of goods; they went off together, and when they came back Maggie was fainty; Maggie told me that she had lost \$800 and could not buy any goods; I told Maggie "you can have all the goods you want." They bought \$50 or \$60 worth of goods. I asked both in writing who I should charge them to and they both said charge the goods to both of them; they sent me the money from some place in Illinois; this was eight years ago; they continued to buy goods of me until about three years ago; they would buy \$35 and \$40 worth of laces every week. Every time Maggie came in I would say "Where is your partner?" she would write down where she was then. It was Maggie who told me she lost the \$800. It was out in the paper for a week and a reward offered; she said she carried it in her bosom. When I asked who the goods should be charged to, Maggie said they were equal partners. Maggie was the general manager in buying and Mary in selling."

Andrew Eichoff, who was in the employ of the Standard Hosiery Mills in St. Louis, in 1884, and until and including the year 1889, testified the appellant and the deceased bought articles such as hosiery, linen, towels, notions, etc., from the establishment with which he was connected almost every week during the five years he was there.

They came to the store together; Miss Loucks did the buying; Mrs. Tinnin "looked on;" Miss Loucks made the payments and on some occasions the goods were sent to No. 300 Broadway where the women had a room rented in which they lived together.

They leased the room of Mrs. Frederick Woydt. She testified that the "deaf mute women" were engaged in selling stamping goods, hosiery, etc, and that she was frequently in their room and learned the sign language; that Maggie Tinnin (appellee's intestate) was often ill and always in delicate health and was confined to the room nearly all the time, but that Mary Loucks went out to sell goods every day

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“rain or shine;” that the witness was frequently in the room when Mary Loucks returned in the evening, and saw Mary give Maggie the pocket book and the money she had taken in, and that Maggie told her they were partners. There was no proof of an express agreement between the women to form a partnership, but the existence of that relation may be established by circumstantial evidence.

Here all the facts necessary to create it are fully proven. It may be the proof does not fully disclose the proportion in which the members of the firm were to share in the gains or be liable for losses, though it was proven Mrs. Tinnin said they were “equal partners.”

In the absence of any proof upon the point the presumption is they were to share equally in profits and bear the losses in the same proportion. Nothing appeared in the proof tending to show appellee's intestate had just right to be allowed more than one-half the gains and profits. Upon the contrary, the whole current of the proof is the appellant rendered the greater service to the business of the firm and was the active, capable and trusted manager thereof.

The health of Mrs. Tinnin was so delicate she was almost entirely incapacitated from actively engaging in making sales of the goods in which they dealt, and for this reason the appellant practically did all the work connected with the business and in addition attended upon and cared for her afflicted companion and partner. Both were deprived of speech and the sense of hearing, and this no doubt brought them together and made them partners and friends and induced the appellant to assume additional burdens in each capacity.

We find little, if anything, in the proof produced in behalf of the appellee tending to contradict that a partnership existed between them; indeed, the evidence in that behalf is chiefly directed to the other question—whether the money found in the trunk was the property of the firm?

The position of appellee upon this question is, the money received from the sale of goods was divided at the close of

each day, or from time to time, and the money found in the trunk was the individual property of the owner of the trunk.

There was proof tending to show the partners divided sums received from daily sale, and perhaps tending to show each had separate parcels of money; but the evidence was conclusive that all the money, whether belonging to them jointly or to each separately, was kept in the same trunk.

Each had a trunk, but it was their custom to keep all the money in Mrs. Tinnin's trunk, as they did many of the articles on hand for sale.

Mrs. Woydt, whose room they rented, testified she was often in their room when the appellant came in from "peddling," and that the appellant "always gave the pocket-book to Mrs. Tinnin, who would count the money and put it in her trunk, and that they kept their clothes in the appellant's trunk and the money in Mrs. Tinnin's trunk."

Testimony produced on behalf of the appellee is confirmatory of the alleged custom of keeping the money in this particular trunk.

Jennie Paden, a sister of Maggie, who was in St. Louis at different times and visited her and appellant in the room which they occupied, though she testified "they each had their own set of business, were room mates and shared expenses, each took care of their own money," and "kept their money separately," except "they kept some in a vase on the dresser with which to pay expenses," was compelled to state, and did state, that "Mary Loucks, when I was with them in St. Louis, counted her money every evening, and *undoubtedly* did put it in Mrs. Tinnin's trunk."

James Paden, a brother of Maggie Tinnin, gave testimony to the effect he was in St. Louis, and one evening, when Mary Loucks came in from her work, saw them divide some silver change, which he understood was the sales of the day; that Maggie put the change she got in her trunk and Mary put some change in the bureau drawer.

The appellant testified the money of both was kept in Maggie's trunk because it was stronger than her trunk.

This testimony we regard as competent for the reason before stated.

Mrs. Starr, a cousin of Mrs. Maggie Tinnin, testified that Maggie came to her house from St. Louis and remained there until she died; that both the trunks were there and that Mary Loucks had the keys to both trunks all the time and that Maggie left the keys with Mary when she left St. Louis.

It further appeared from the testimony of Patrick Coughlin, that the money of the firm was, at times at least, in the possession of Maggie Tinnin and in one package. He testified Maggie and the appellant came to his place of business and said they were going to buy a nice bill of goods; that they went off together and soon after returned, and Maggie told him she had lost \$800, which she had in her bosom, and therefore they could not buy the goods; that he offered to sell them the goods on credit, and did so, etc., and charged the goods to both of them by the written direction of both.

The appellant after the death of Mrs. Tinnin produced the keys to the trunks and at the request of the administrator opened both trunks.

Money in bank bills to the amount of \$1,550 was found in Mrs. Tinnin's trunk, and also in the same trunk were found hose, corsets, stamping goods, patterns, and notions confessedly of the stock in trade of the firm.

Upon the statement of the administrator that she should lose none of her rights thereby, and he would see she got whatever interest she was entitled to, the appellant allowed him to take the money. The conclusion sought to be drawn from the appearance of the bank bills and the fact they adhered together—that they had been in the package for a much longer period of time than as stated by the appellant, was, as we think, entirely overcome by the testimony of the cashier of the bank, whose experience in handling money and keeping it in packages peculiarly qualified him to throw light upon the subject.

Counsel for appellee urge the appellant made many contradictory statements as to the amount she was entitled to

have out of the money in the trunk, and attach much importance to such contradictions as tending strongly to show she had no real interest whatever in the money. These contradictions are, as we think, apparent only, at least are explainable upon theories entirely consistent with the honesty and justice of her claim to one-half of the money as partner of the deceased.

Her claim to all the money was based, in part, upon the alleged expressed intention of Mrs. Tinnin that she should have all of it in case of her (Mrs. Tinnin's) death, and in part because she insisted she had earned Mrs. Tinnin's half of the money by working for her and attending upon and caring for her when she was sick.

These supposed contradictions are based largely upon questions asked and answered in a conversation carried on by means of signs between appellant and Miss Jennie Paden. As to this conversation Miss Paden testified, "some of the questions were asked a number of times before the appellant could understand their meaning;" that she (the witness) "thought she interpreted the answers correctly, but there might have been misunderstandings;" she understood "the appellant claimed all the money because Mrs. Tinnin wanted her to have it all; also claimed it as a partner; claimed all as a gift; then all because she had earned Mrs. Tinnin's half by working for and boarding her," etc., etc.

The appellant testified Mrs. Tinnin wanted her to have all the money except \$100, which was to be given to Miss Jennie Paden.

In stating her supposed interest in the money under these various claims of right therein the appellant, of course, claimed different amounts, but we find nothing in any of her claims inconsistent with the justice of her demand for one-half the money in her right as partner.

The case was presented to the learned chancellor who presided in the Circuit Court upon depositions and written testimony—we have before us the same testimony, and our facilities for determining as to the credibility of the witnesses and as to their truthfulness are not less or inferior to

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those enjoyed by the trial judge. After a thorough investigation and careful consideration thereof we are constrained to declare the preponderance thereof manifestly supported the position that the money in question was the property of the appellant and the deceased in equal parts.

For this reason the decree is reversed and the cause remanded with directions to the Circuit Court to enter an order and decree requiring the administrator to deliver to the appellant one-half of the money found in the trunk of deceased, viz., the sum of \$775, and to pay the costs in due course of administration.

Reversed and remanded with directions.

68	558
101	1579
101	1581

Frank B. Layton v. Mary Deck.

1. MASTER AND SERVANT—*Disobedience of the Servant does not Relieve the Master from Responsibility.*—It is the duty of the servant to obey the instructions of the master, but his disobedience does not exonerate the master from liability to respond for any actual damages occasioned thereby.

2. EXCESSIVE DAMAGES—*How the Question is to be Raised.*—Where no complaint is made, in a motion for a new trial, that the damages are excessive, the question can not be raised in the Appellate Court.

**Trespass on the Case.**—Sales of intoxicating liquor. Appeal from the Circuit Court of Champaign County; the Hon. FRANCIS M. WRIGHT, Judge, presiding. Heard in this court at the May term, 1895. Affirmed. Opinion filed January 11, 1896.

STATEMENT OF THE CASE.

The action below was case by the appellant to recover, under the provisions of the "dram shop" act, damages occasioned to her means of support by the intoxication of her husband, and, as alleged in one count, by his death in consequence of such intoxication.

Appellant kept a drug store, and the evidence tended to show and satisfied the jury, he sold John Deck, husband of

appellee, alcohol which caused him to become intoxicated and to neglect his business, waste his time and money. The evidence also tended to show said Deck came to his death from the effects of laudanum, taken in excessive quantity, while under the influence of alcohol procured of the appellant.

Verdict and judgment for \$500, and appeal to this court.

LAWRENCE & LAWRENCE, attorneys for appellant.

SALMANS & DRAPER, attorneys for appellee.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

A witness, denominated by counsel for appellant "a rival druggist," was introduced by appellant. His examination in chief disclosed the fact he and appellant were engaged in the business of selling drugs, etc., in same village, and that both kept alcohol in stock. Upon cross-examination counsel for appellee asked the witness if he had ever sold alcohol to John Deck and received a reply in the negative. Counsel then asked "or to any of his family?" to which the witness again replied in the negative.

Counsel then asked "or to any one else?" and the witness made like answer as before.

After this last reply had been made, counsel for appellant objected and moved the court to exclude all of the questions and answers. The court ruled the testimony was received without objection at the proper time and refused to exclude it.

If this was error, it is certainly not so grievous as to warrant reversal.

Evidence had been introduced by the appellee showing Deck obtained alcohol, and tending to show he got it at appellant's drug store.

The testimony of the witness in question disclosed the fact alcohol was kept at the same time at another drug store in the village, from which an inference might arise Deck procured the alcohol there.



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Under such circumstances we do not think it was improper for appellee to inquire whether the witness had let Deck have alcohol.

The fifth instruction is not open to the criticism that it assumes Deck was intoxicated. It leaves that as a question to be determined from the proof.

It is complained the sixth instruction is faulty in that it declares the appellant answerable for sales made by himself or his servants or employes, without advising the jury appellant should only be held liable for the acts of his servants and employes done within the scope of their employment.

Evidence upon behalf of the appellant tended to show his employes were under strict orders not to sell alcohol under any circumstances.

Other testimony tended to show his prescription clerk had sold such liquor to said Deck. There was no testimony tending to show sales by any other employe.

The instruction therefore had reference to the liability of appellant for the act of his prescription clerk.

It was within the scope of the duties of this servant to sell alcohol compounded with other drugs, or no doubt to sell it upon prescription. When we consider all the testimony it is apparent the direction of his principal was he should not sell it for other purposes.

It was his duty to obey such instructions, but his disobedience would not exonerate the master from liability to respond for any actual damages occasioned thereby. *Keedy v. Howe*, 72 Ill. 133.

The instruction under consideration and instruction No. 10 being the only instructions declaring liability because of the acts of the servant of the appellant, limited such liability to damages actually sustained by the plaintiff.

We have examined instruction No. 11 and 11½, and 13, being the only instructions having reference to the award of exemplary damages.

The criticism upon them, that they advise the jury exemplary damages should be awarded if the appellant acted willfully or wantonly or with reckless disregard of the con-

sequences of his acts, is not well grounded. No such inference can fairly be drawn from them.

Upon the contrary, in one of the instructions it is expressly stated such damages do not follow an unlawful act as a matter of right, and the only direction to the jury in any of them is they may award punitive damages.

Aside from this the jury only allowed damages in the sum of \$500, and no complaint was made in the motion for a new trial, the amount was excessive. There is no room to indulge the supposition any sum was allowed for vindictive damages.

No objection by way of demurrer was made to the declaration or either count thereof.

The supposed defects in the second count now sought to be availed of are of such character they are cured by a verdict according to the familiar and well settled rule.

The real issue in the case was one of fact. It was determined by the jury adversely to the appellant upon conflicting evidence and under instructions which fairly presented the law.

The facts disclosed by the evidence as accepted by the jury showed the appellant was at least indirectly engaged in selling intoxicating liquors. The principles announced in *Cruse v. Aden*, 127 Ill. 231, have no application to the case.

The judgment must be and is affirmed.

**The People ex rel. John R. Richards v. Mary A. Ridgley, Executrix.**

1. PROBATE COURT—*Functions of.*—The function of a Probate Court is to cause the property of deceased persons to be disposed of according to law. First, to the discharge of the just claims of others—next, to those entitled to the residue under the provisions of the will, if the deceased left a will, and if he left no will, to those entitled under the statute of descents. The power of the court and its duty to cause the estate to

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The People v. Ridgley.

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be administered upon, according to law, is the same whether the estate is testate or intestate.

2. *WILLS—Legatee not Required to Account.*—A provision in a will that a legatee and executor shall not be required to account to any one for the use of property willed to him has no reference to his duty as executor to report to the court concerning the discharge of his duty under the statute and his oath of office.

3. *SAME—Power of Testator.*—It is not within the power of a testator to nominate an executor to be appointed by the court to administer upon his estate under the statute, and to empower the person so appointed to omit the performance of a legal duty imposed upon him by the statute as such executor.

**Administration of Estates.**—Appeal from the Circuit Court of Macoupin County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the May term, 1895. Reversed and remanded, with directions. Opinion filed January 11, 1895.

## STATEMENT OF THE CASE.

Richard Ridgley died testate on or about March 28, 1887. His will was duly proven and admitted to probate April 13, 1887.

By its first clause the testator bequeathed "\$3,000 to Mary G. True, to be paid when she should arrive at the age of eighteen years, but in case she should die before attaining that age the legacy to be paid to Mary A. Ridgley, wife of testator, to be used by her as she may wish."

The will in its second clause bequeathed the sum of \$1,000 in trust for the benefit of the Congregational Society of Bunker Hill, "to be loaned for its use and the interest paid to it, provided its trustees shall furnish Mary A., wife of the deceased, a pew in the church free of charge."

The remaining clauses in the will are as follows:

"Third. I give and bequeath to my wife, Mary Ann Ridgley, all the rest, residue and remainder of my estate, both real and personal, of every name and nature during her natural life.

"And I further hereby empower my said wife, Mary A. Ridgley, to sell and convey and make good and sufficient deeds of conveyance to any or all of the real estate which I may own at the time of my death, and to sell and dispose

of all or any of the personal property which I may own at the time of my death. And it is my will that my said wife use or invest the proceeds of such sale or sales as she may see fit. And it is my will that she shall not be required to account to any one for the use of the same.

"Fourth. After the death of my wife, Mary Ann Ridgley, it is my will that what shall remain of my estate shall be equally divided between the heirs of my two sisters, Rhoda Bird and Eliza Richards.

"Fifth. I hereby appoint my wife, Mary Ann Ridgley, the sole executrix of this my last will, hereby revoking all former wills by me made, and I order and direct that no bond be required of my said executrix.

"Sixth. It is my will that after the death of my wife John R. Richards shall take charge of and finish the settlement of my estate."

The appellee, the widow of deceased, accepted the appointment as executrix under this will, and on the 13th day of April, 1887, qualified as executrix and entered upon the discharge of her duties as such.

On June 22, 1887, the executrix filed an inventory of the estate, showing the assets to be a number of town lots in Bunker Hill, Illinois, notes and accounts amounting to \$20,540, and household furniture, etc., of the appraised value of \$618.95. The household furniture, etc., at the valuation of \$618.95 was taken by the widow on her award of \$1,033.

The executrix has never made a report to the Probate Court or rendered an account of any character in said estate from the time of filing the inventory.

On the 18th day of July, 1894, John R. Richards, who is charged by the will with the duty of administering the trusts created by it in case of the death of the executrix, filed in the County Court of Macoupin County a petition asking the court to require said executrix to appear and file report of her acts and doings in and about the affairs of the estate.

The petition alleges the executrix failed to report within two years after her appointment, and that she now refuses

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to report, and that the petitioner is informed and believes the executrix has unlawfully handled the assets of said estate, has grossly and willfully wasted the same and given away large sums of money belonging to the estate, and has unlawfully disposed of land and equities in land, to the great injury of the petitioner and the residuary legatees.

The appellee, executrix, moved the County Court to dismiss the petition; the grounds of the motion are set out therein as follows:

“Because she says, under the provisions of the will of Richard Ridgley, the petitioner in this cause is not entitled to an accounting of said estate during the lifetime of said Mary A. Ridgley.”

The County Court overruled the motion and entered an order requiring the executor to make and file a report within thirty days.

She appealed, and the Circuit Court reversed the order, from which this appeal has been taken.

CHARLES E. RICHARDS, A. N. YANCEY and ANDERSON & BELL, attorneys for appellant.

E. W. HAYES and RINAKER & RINAKER, attorneys for appellee.

OPINION PER CURIAM.

Sec. 112, Chap. 2, R. S., is as follows:

“All executors and administrators shall exhibit accounts of their administration for settlement to the County Court from which letters testamentary or of administration were obtained, at the first term thereof after the expiration of one year after the date of their letters, and in like manner every twelve months thereafter, or sooner if required, until the duties of their administrations are fully completed,” provided “no final settlement shall be made and approved by the court unless the heirs of the deceased have been notified thereof in such manner as the court may direct.”

Sec. 113 of the same chapter provides, upon every such

settlement of the accounts of an executor or administrator, the County Court shall ascertain the whole amount of money and assets belonging to the estate, which have come to the hands of the executors or administrators, and shall cause the debts to be paid, etc.

Sec. 114 requires the court to enforce the final settlement of estates, and empowers it to cite and attach an executor or administrator who fails to make reports and settle his estate.

The statute is applicable to the executrix in the case at bar, and we think the order of the County Court requiring compliance therewith, was correct and proper and should have been affirmed.

The argument of counsel for appellee is that as the executrix had made an inventory of the property of the estate, and as no demand that she should report had been made by any creditor or legatee, and as the will, as they construe it, provides that she should not be required to account to any one for the use made of any property coming to her under its third clause, she was absolved from all duty to report to the court.

This view is entirely unsound.

The court, as we have seen, is charged by the statute with the affirmative duty of seeing and knowing that creditors are paid and with the like duty of enforcing final settlement of the estate, which includes, of course, the payment of legacies. To insist an executor, after filing an inventory, may omit to make stated reports to and settlements with the court, unless forced to do so upon the complaint of a creditor of the estate or a person entitled to a legacy under the will, is to entirely misapprehend the duties of the executrix and the power and function of the court.

The function of a Probate Court is to cause the property of deceased persons to be disposed of according to law—first, to the discharge of the just claim of others; next, to those entitled to the residue under the provisions of the will, if the deceased left a will, and if he left no will, to those entitled under the statutes of descent. The power of

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the court and its duty to cause the estate to be settled—administered upon according to law—is the same whether the estate is testate or intestate.

It is necessary to the proper discharge of this duty that executors and administrators shall advise the court by way of reports of their acts and doings with the property of the deceased person. If they fail to do so, the court should, upon its own motion, bring them into court and compel them to present and file proper reports and statements of their accounts as officers of the court.

The provisions in the third clause of the will that Mary A. Ridgley, the legatee under that clause, should “not be required to account to any one,” etc., has no reference to her duty as executrix to report to the court concerning the discharge of her duty under the statute and her oath of office.

Moreover, it is not within the power of a testator to nominate an executor to be appointed by the court to administer upon his estate under the statute, and to empower the person so appointed to omit the performance of a legal duty imposed by the statute upon him as an executor.

In the case at bar the executrix should have been required to report, not only because of the peremptory requirements of the statute, but because the rights and interests of other persons in the property left by the testator demanded she should do so.

It is only through the medium of her reports that the court, and others interested in the estate, can know whether the claims of creditors had been met, or the wishes of the testator relative to the bequest to Mary G. True been observed, or his intention and direction that a fund should be created for the benefit of the Congregational Society of Bunker Hill had been carried into execution, or the estate administered, and the assets so managed that the residuum would be enjoyed by those persons whom the testator desired should receive it mediately or immediately.

It will not do to say the executrix may construe a clause in the will to give her absolute title to property in which a

possible, or contingent interest, is invested in other persons by other clauses of the will, and, upon the faith of her construction, refuse to make report to the court of her acts and doings with relation to that property.

Whether the power given the executrix as legatee in the third clause of the will is "to use and invest" as "she should see fit," all the residue of the estate, or only the proceeds arising from sales of real estate and chattel property, which she was authorized thereby to make, and whether the declaration in the same clause that "she shall not be required to account to any one for the use made of the same," referred to the residue of the estate which consisted most largely of moneys and notes, or only to the proceeds of such sales, and whether the power given her "to use and invest" as she may see fit without being required to account therefor," authorized her to dispose of property otherwise than for her own use or by way of investment are all questions for the determination of the courts. The property involved, its amount and character, and the acts and dealings of the executrix with it, should fully appear of record, so that the judgment of the court may act upon it and control the disposition to be made of it under the will. The executrix should have obeyed the statute by exhibiting to the court at regular intervals, as required by law, full reports of her acts and doings by virtue of her letters testamentary.

The order of the Circuit Court exempting her from the duty of reporting, must be reversed and the cause remanded with directions to enter an order, and judgment requiring the executrix to report in compliance with the order of the County Court. Reversed and remanded with directions.

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**Samuel R. Callaway, Receiver, and Wesley Kemp, v.  
George Walters.**

1. PRACTICE—*Exceptions Must be Preserved, etc.*—The refusal of the court below to transfer the case to the United States Court can not be reviewed in this court when the bill of exceptions does not include



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the petition, affidavit and bond, or show that any exception was taken to the action of the court on the motion.

2. *SAME—Shifting Grounds.*—A party having procured the law to be announced to the jury can not be permitted to assign the same for error and thus question the correctness of a rule declared at his request.

3. *SAME—Questions of Misjoinder Must be Raised in the Court Below.*—The objection that the defendants are not jointly liable must be made in the trial court. It can not be made in the first instance in the Appellate Court.

4. *RAILROADS—Duty Toward Trespassers.*—The fact that a person is a trespasser upon the track of a railroad company does not relieve its servants from the duty of making use of reasonable efforts to avoid injuring him upon discovering that he is in danger.

5. *SAME—Presumption as to Persons Trespassing upon the Track.*—The engineer in charge of a locomotive engine can not assume that a person trespassing upon the track will leave it in time to escape, and upon such assumption continue on with his train until he discovers such person is heedless of his danger.

**Trespass on the Case, for personal injuries.** Appeal from the Circuit Court of Coles County; the Hon. FRANCIS M. WRIGHT, Judge, presiding. Heard in this court at the May term, 1895. Affirmed. Opinion filed December 21, 1895.

## STATEMENT OF THE CASE.

On the third day of June, 1893, the appellee, and one Goldie M. Spurgeon, his niece, a child not quite ten years of age, while walking along the track of the Toledo, St. Louis & Kansas City Railroad, upon a bridge constructed by said railroad company over Kickapoo creek, in Coles county, Illinois, were run upon by an engine drawing a train of passenger coaches.

The girl was instantly killed, and the appellee was thrown from the bridge to the ground, a distance of about twelve feet, his right leg broken and other injuries less serious inflicted upon him. They were using the bridge for purposes of their own convenience, and were trespassers upon the track.

The appellant, Callaway, as receiver, under appointment by the United States Circuit Court for the Southern District of Illinois, was then operating the railroad, and the appellant, Kemp, was in his employ as locomotive engineer, and

was controlling the engine which struck the appellee and the child.

This was an action on the case, brought by appellee to recover damages for the injuries sustained by him.

He obtained a judgment in the sum of \$2,500, from which this appeal has been prosecuted.

W. P. TYLER and CHARLES G. GUENTHER, attorneys for appellants; CLARENCE BROWN, of counsel.

A trespasser on a railroad track can not recover for injuries inflicted by the company, unless the injury was willfully or wantonly caused by the defendant, or unless the defendant is chargeable with such gross negligence as evidences willfulness. *Eggman v. St. Louis, A. & T. H. R. Co.*, 47 Ill. App. 507; *Blanchard v. L. S. & M. S. Ry. Co.*, 126 Ill. 416; *Ill. Central v. Hetherington*, 83 Ill. 510; *Ill. Central v. Godfrey*, 71 Ill. 500; S. C., 22 Am. Rep. 112; *Barstow, Adm'r, v. Old Colony R. R. Co.*, 143 Mass. 535; C., C. & St. L. Ry. Co. v. *Tartt*, 64 Fed. Rep. 823; *Roden v. Chicago & Grand Trunk R. R. Co.*, 133 Ill. 72; 23 Am. St. Rep. 585; *Dillon v. Connecticut River Ry. Co.*, 154 Mass. 478; *Missouri Pac. Ry. Co. v. Moseley*, 57 Fed. Rep. 921, 922; *Kirtley v. Chicago, M. & St. P. Ry. Co.*, 65 Fed. Rep. 386, 392; *Illinois Central R. R. Co. v. Noble*, 142 Ill. 587; *Abend v. T. H. & I. R. R. Co.*, 111 Ill. 202.

An engineer is not required to keep a lookout for trespassers upon the right of way and track of the company, and the extent of his duty to the trespasser is only to exercise ordinary care to avoid a collision after he discovers that such trespasser is in a perilous position. *Terre Haute, etc., Co. v. Graham*, 95 Ind. 286; 12 A. & E. R. Cas. 77; *St. Louis, I. M. & S. Ry. Co. v. Monday*, 4 S.W. Rep. 782; *McAllister v. Burlington, etc., R. R. Co.*, 64 Iowa, 395; *Amer. & Eng. Ency. of Law*, Vol. 19, p. 936; *Thomas v. Chicago, M. & St. P. Ry. Co.*, 61 N. W. Rep. 967. (Decided January 18, 1895.)

The engine driver seeing a person on the track is not negligent in not stopping the engine before striking him, unless

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he has reason to believe the person can not, or being unaware of his danger, probably will not get off. Ill. Central R. R. Co. v. Frelka, 9 Ill. App. 605; C., I., St. L. & C. Ry. Co. v. Long, Adm'r, 112 Ind. 166; St. L., etc., R. R. Co. v. Manly, 58 Ill. 300; Beach Con. Neg. 394; Telfer v. Northern R. R. Co., 30 N. J. Law, 188; Louisville & N. R. Co. v. Black, 8 Southern, 246; Herring v. Wilmington & R. R. Co., 51 Am. Dec. 895; Indianapolis & V. R. R. Co. v. McClaren, Adm'r, 62 Ind. 566, on page 568; C., R. I. & P. R. R. Co. v. Austin, 69 Ill. 426; Railroad Co. v. Hall, 72 Ill. 224; Railroad Co. v. Modglin, 85 Ill. 481.

HUGHES & HAYES, and J. W. CRAIG, attorneys for appellee.

A railroad is not required to anticipate the presence of unauthorized persons upon its tracks nor to constantly exercise vigilance in order to ascertain that the track is free, or to discover whether or not trespassers are on the track; its only duty in such state of case being to use every reasonable effort to avoid injuring any one who may be discovered upon the track, and not to injure any person wantonly or willfully. Wabash Railroad Co. v. Jones, 53 Ill. App. 587.

By a verdict of a jury upon a question of fact alone, when fairly submitted, the successful party obtains certain rights which are recognized by the law, and such verdict must stand, although it may appear to be against the weight of evidence, *unless it is apparent upon the face of the record* that the jury were actuated by passion or prejudice. Shelton v. O'Reiley, 32 Ill. App. 641.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

We can not review the refusal of the court to transfer the case to the United States Circuit Court for the reason the bill of exceptions does not include the petition, affidavit and bond, or show any exception was taken to the ruling of the court upon the motion to transfer the cause. Mer. Des. Trans. Co. v. Joestling et al., 89 Ill. 152.

The declaration contained several counts but the evidence for the appellee applied only to those which proceeded upon the theory the engineer saw the appellee upon the

bridge and failed to exercise ordinary care to avoid striking him.

Whether liability can be legally predicated upon the mere failure of the engineer to exercise ordinary care to avoid injuring a trespasser discovered by him upon the track and in danger can not be regarded as an open question in this case for the reason the parties hereto are concluded as to the point by the instructions which they respectively procured the court to give to the jury.

The appellants asked, and at their instance the court gave the following instructions:

"9. You are instructed that if it appears from the evidence in this cause that the plaintiff was a trespasser upon the track or bridge of the defendant receiver, at the time he was struck and injured, then said defendant receiver was not required and the law did not impose any duty whatever upon his engineer to discover the plaintiff's presence upon the same, but only required him after he discovered the plaintiff and had knowledge that he was in a perilous position, to exercise reasonable care and prudence to avoid collision; and if it further appears that the engineer did exercise such care and prudence and did everything within his power to prevent the train from colliding with said plaintiff after he discovered him, then your verdict must be for the defendants.

10. The defendants are liable in this case only if the engineer failed to exercise ordinary care to prevent the injury, after he became aware of the danger to which plaintiff was exposed, and by ordinary care is meant such care as would be ordinarily used by a prudent person performing a like service under similar circumstances."

Other instructions given in the same behalf enunciated the same legal principles in different phraseology.

Instructions given on behalf of the appellee were to the like effect but stated the rule more favorably to the appellants in this, that they declared the right of appellee to recover to be dependent upon the exercise by him of ordinary care for his own safety at the time he received his injury.

Having procured the law to be so announced to the jury, the appellants can not be permitted to assign same as for error and thus question the correctness of a rule declared at their request. *Con. Coal Co. v. Haenni*, 146 Ill. 621.

Moreover the doctrine of the instructions is supported by decisions of our Supreme Courts and by text writers of standard authority. *L. S. & M. S. R. R. Co. v. Bodemer*, 139 Ill. 605; *I. C. R. R. Co. v. Noble*, 142 Ill. 587; *Deering, Law of Neg.*, p. 607.

This court so accepted and declared the rule in *Wabash R. R. Co. v. Jones*, 53 Ill. App. 587, now pending in the Supreme Court on appeal.

Appellee acted with great imprudence in going upon the bridge, more especially as he knew a train was soon due to pass over it.

But this could not be held to relieve the engineer from the duty to use every reasonable effort to avoid injuring him after discovering he was in danger.

It clearly appeared, indeed, the engineer testified he saw appellee upon the bridge.

The vital question then arose whether the requisite care and diligence was exercised to avoid injuring him.

This was a question of fact. We have carefully read the evidence bearing upon it.

It was conflicting, but that tending to support the charge the engineer was derelict, amply justified the court in refusing to grant appellant's motion to take the case from the jury.

The bridge crossed the stream from north to south. The train was moving south and the appellee and the little girl were walking in the same direction.

They were, when struck by the engine, within twenty or thirty feet of the south end of the bridge. It was 400 feet in length and the engineer saw appellee walking upon it when the engine was at a point 800 feet north of its northern end and nearly 1,200 feet north of the point where appellee was when the engine ran upon him. It appeared the engineer shut off steam from the engine when he discovered

appellee upon the bridge, but the evidence tended very strongly to show he failed then to take other effective and safe means within his power to stop the train.

He applied the air brakes, but only in the "service stop" which is used for checking up a train when approaching a station where it is designed to stop. The engine was provided with an "emergency stop," by means of which the full power of the brakes might have been exerted and the motion of the train much more speedily overcome.

He shut off the steam from the engine, but did not reverse the lever which seems would have tended to produce a backward motion of its machinery.

The fireman testified the engine was thus allowed to "drift" down to the north end of the bridge or near that point, and then the engine was reversed and the brakes applied in the "emergency stop." A passenger on the train testified he did not observe any slacking in the speed of the train except a sudden and severe shock after the train was upon the bridge.

A witness who was traveling on a highway which crosses the railroad 400 feet north of the bridge testified he did not notice any checking of its speed until it was upon the bridge. Another witness who was upon the highway approaching the railroad from the west testified the train dashed across the highway crossing at a high rate of speed, thirty or forty miles per hour, in his judgment.

There was, therefore, evidence warranting the jury in concluding the engineer failed to use the means provided for stopping the motion of the train until the north end of the bridge was reached. These means were then used but it was too late.

The engineer testified he thought appellee was "a bridge repairer," and supposed he would step from the track and stand upon the timbers of the bridge while the train was passing as he said it was the custom of such workmen to do, and therefore did not act as promptly as he otherwise would, but that when he saw the little girl he realized his error, and at once put in operation every appliance pro-

vided to stop the train, but could not do so in time to avoid a collision.

Out of this testimony arose a contention of fact whether reasonable diligence was exercised.

It was peculiarly the province of the jury to determine it.

Manifestly, we can not, in view of all the evidence, say their finding was palpably wrong.

Complaint is made the court refused the following instruction asked by appellants:

"17. If you believe from the preponderance of the evidence in this case that the plaintiff of his own convenience, and that of Goldie Spurgeon, a child of tender years in charge of said plaintiff, at or before the time the plaintiff was struck, was walking along the track, he was not a lawful traveler thereon, and had no right there, and the defendant receiver was under no obligation to give him or said Goldie Spurgeon the right of way over his track in preference to his train; and if the plaintiff at and before he was struck was walking with said Goldie Spurgeon on or near the track, and in consequence of so walking along or on the track the said Goldie Spurgeon was placed in danger, and the plaintiff tried to rescue her and was hit, you must find for the defendant unless the injury was willfully inflicted."

It ought not have been given.

Whatever the appellee did toward assisting the little girl to escape could only have been important for consideration in connection with all the other facts and circumstances in proof bearing upon the question whether he exercised ordinary care to secure his own safety.

It was not competent for the court to select one fact and declare negligence therefrom as a matter of law.

Appellee might have "tried to rescue" the girl without incurring additional danger, and surely the court ought not have directed the jury that as matter of law plaintiff could not recover if he made any effort to assist her.

The court also refused to instruct the jury, an engineer may assume a person trespassing upon the road will leave

the track in time to escape, and may continue to run his train until he discovers such person is heedless of danger.

We know of no rule of law thus regulating the conduct of an engineer.

The law is, he must exercise ordinary care to avoid injuring any one discovered by him to be upon the track and in danger.

Doubtless, in most instances, the engineer may as matter of fact assume a person walking on the track will step off before the train reaches him, but we do not think such assumption could have been safely indulged in the instance at bar. Appellee, as the engineer well knew, was upon a bridge; and any assumption that might be indulged in as to a person walking where he could with safety leave the track by stepping upon the ground to the right or left could not be entertained, but rather it ought to be assumed a person on a bridge must pass along the track until he could reach the end of the bridge.

The fourth instruction asked by appellants, and refused, presented no principle of law not fully and correctly given in other instructions.

The court gave fourteen instructions in behalf of appellants, covering fairly and fully the law of the case.

The complaint that improper evidence was admitted, is based upon the contention that a witness was allowed to answer a hypothetical question which, as it is alleged, assumed facts not proven.

The intendments to be drawn from the proofs, in our opinion, were such as to warrant the court in allowing the witness to answer.

The complaint the court refused to allow the witness Johnson to answer whether it was the "custom or habit of bridge carpenters to step out on the caps when a train is passing" is groundless. The witness answered the question fully, so far as it related to the case, and was cross-examined thereon.

We see no reason to regard the damages as excessive.

The objection, the appellants are not jointly liable, was



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not made in the trial court, and can not be first raised here. The judgment being against Callaway as receiver, and against Kemp as an individual, and awarding general execution against both, is an anomaly. But a misjoinder, and the consequence thereto, if the plaintiff should succeed, was not suggested in the lower court by demurrer or plea in the motion for a new trial, or by motion in arrest, or otherwise, and the irregularity of the judgment is not specifically assigned for error in this court.

We therefore decline to consider any suggestion in relation to the question. *Eich v. Severs*, 73 Ill. 194.

The judgment must be, and is, affirmed.

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**S. R. Callaway, Receiver, v. Sarah E. Spurgeon, Administratrix.**

1. **CORONERS—*Excess of Jurisdiction.***—It is not within the jurisdiction of a coroner or of the jury impaneled by him at an inquest, to inquire who, or whether any one, is legally liable to respond in damages because of the death of the person upon whom the inquest is held.

2. **CORONER'S VERDICT—*As Evidence, Extraneous Matter Stricken Out.***—A finding in a coroner's verdict that a death was not occasioned by negligence of a character sufficient to support an action at law for damages, is extra-judicial and void, and is properly stricken out before the verdict is admitted in evidence in action for damages resulting from the death of the person in question.

3. **DAMAGES—*Elements of—Death of a Minor from Negligence.***—Parents are entitled to services of a minor until he becomes of age, and the law implies pecuniary loss to them by reason of his death. It is proper to estimate such loss from proof of the age of the minor and the number of years he would render services to his parents, considered in connection with the knowledge and experience possessed by the jurors in relation to matters of common observation.

4. **EVIDENCE—*Personal Characteristics to Enhance Damages.***—In an action to recover damages for the death of a minor child owing service to its parents, proof of personal characteristics may be introduced to enhance the damages.

5. **SPECIAL FINDINGS—*When not Inconsistent with the General Verdict.***—In an action against a railroad company for killing a child who was a trespasser upon the track, the jury returned a verdict in favor

of the plaintiff, and also a special finding that the engineer did not purposely or willfully run the locomotive against the child. *Held*, that the special finding was not inconsistent with the general verdict, as the controlling question was, whether the engineer exercised ordinary care after he discovered the child upon the track, to avoid injuring her.

**Trespass on the Case.**—Death from negligent act. Appeal from the Circuit Court of Coles County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the May term, 1895. Affirmed. Opinion filed December 21, 1895.

BAYLESS, GUENTHER & CLARK, attorneys for appellant;  
CLARENCE BROWN, of counsel.

HUGHES & HAYES, attorneys for appellee.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

On the 3d day of June, 1893, Goldie M. Spurgeon, a girl aged nine years and five months, while walking along the track of the Toledo, St. Louis and Kansas City Railroad upon a bridge across Kickapoo creek, in Coles county, Illinois, was run upon, struck, and instantly killed by an engine attached to and drawing a passenger train. She was at the time in company with one George Walters, her uncle, a man of mature age, both of whom were walking together and endeavoring to make their way across the bridge. They were trespassers on the track of the appellant's road, and both were struck at same time by the same train, but he was more fortunate than she and suffered only to the extent of a broken arm and other less serious hurts.

In the preceding case, in which said Walters was appellee and the appellant company and the engineer Kemp were appellants, we affirmed a judgment rendered in favor of Walters for the damages sustained by him on the occasion in question.

This is an appeal from a judgment rendered in favor of the appellee as administratrix of Goldie M. Spurgeon in an action on the case, under the statute to recover damages occasioned by her death to her father and mother, her next of kin.

The two cases are substantially the same in point of law

and fact and there is therefore no reason why we should repeat here what was said in the Walters case as to the rules of law relative to the duty of an engineer toward a trespasser discovered to be upon the track and in danger.

The chief question of fact in that case as in this was, did the engineer, after he discovered Walters and the girl upon the bridge and in danger, use due care to avoid injuring them. The evidence bearing upon it was not materially different, and we are constrained to accept the conclusion of the jury in one case as in the other.

The appellant in the case at bar offered in evidence the verdict of the coroner's jury returned in the course of an inquest held over the body of the girl. It contained a finding that "her death was the result of an unavoidable accident."

The court erased the word "unavoidable" before permitting the verdict to be read to the jury.

An "unavoidable accident" is defined as "one not occasioned in any degree, remotely or directly, by such want of due care as the law holds every one bound to exercise." Anderson's Law Dictionary.

It is not within the jurisdiction of a coroner or of the jury impaneled at an inquest to inquire who or whether any one is legally liable to respond in damages because of the death of the deceased.

A finding in such a verdict that death was not occasioned by negligence of a character sufficient to support an action at law for civil damages, is extra-judicial and therefore void.

Had the verdict gone to the jury without any change, as it should have done, it would have been the duty of the court to instruct the jury to disregard the finding that the killing was the result of an "unavoidable" accident, and that it was their province to determine whether the death was occasioned by a want of due care.

Striking out the word had no greater effect than would such instructions. Hence the appellant was not prejudiced thereby.

It was not indispensable that proof of the value of the labor of the child should be made in order to warrant the

assessment of damages for the benefit of the father and mother.

They were entitled to her services while she was a minor and the law implies pecuniary loss to them by reason of her death. It could be estimated by the jury from proof of the age of the child and the number of years she would render service to her parents, considered in connection with the knowledge and experience possessed by the jurors in relation to matters of common observation. Proof of personal characteristics of the deceased may be introduced to enhance the damages, but it is not necessary that such testimony should be produced. *City of Chicago v. Scholten*, 75 Ill. 468; *City of Chicago v. Hessing*, 83 Ill. 204.

Instruction No. 17, which was refused, advised the jury an engineer is not required by law to stop his train the moment he discovers a person walking upon the track, but may assume such person will leave the track in time to escape danger, etc.

If such an instruction is ever proper, it was not so in this case, because it was wholly inapplicable to the situation. The assumption a person who is walking upon the track of a railroad, and who can leave it by stepping from it upon the ground to the right or left, could not be indulged in as to one who is upon the track upon a bridge.

Instruction No. 23 to the effect an engineer is not to be deemed guilty of wantonness or willful negligence, simply because he may fail to notice a person on the track, was properly refused.

It had no application to facts of the case.

It was proven and conceded the engineer saw the girl and Walters upon the bridge, and the right to recovery was based upon the claim he failed, after seeing them, to use ordinary care to avoid striking them.

The refused instruction No. 25 was but a repetition of the principles announced in instructions No. 13, 18 and 24, which were given.

The court gave twenty instructions at request of appellant, and in them stated the law of the case fully and fairly, as we conceive it to be.

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Chamberlin & Griffith v. L. E. & W. R. R. Co.

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It is urged the special findings returned by the jury demanded a general verdict for the appellant.

Three questions were submitted. By the answer to the first the jury found the deceased was a trespasser upon the track of appellant's railroad and the finding of the second is the engineer after he discovered her on the track, did not use the means in his power to stop the train and thus avoid striking her. The finding of third special answer is the engineer did not purposely or willfully run the locomotive against and over the child.

The contention these special findings are consistent only with a general verdict for the defendants, rests upon the assumption of counsel for appellant that, to quote from their brief, "the ultimate and controlling question in this case was whether or not the engineer willfully, wantonly or purposely killed the child."

If we are right in the view expressed in the Walters case the controlling question was whether the engineer exercised ordinary care after he discovered the child to avoid injuring her.

Tested by this view the special findings are consistent with the general verdict returned for the appellee and would be inconsistent with any other verdict.

We are impressed with the correctness of this as the true rule of law, and also that the evidence presented it as a fair question of fact to be determined by the jury whether such care was exercised.

We think there is no error of reversible character in the record. The judgment is affirmed.

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**Chamberlin & Griffith, for use, etc., v. Lake Erie and W. R. R. Co.**

1. PRACTICE—*Bill of Exceptions*.—The bill of exceptions must show the exceptions relied upon.

**Trespass on the Case.**—Damage by fire. Appeal from the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge,

presiding. Heard in this court at the May term, 1895. Affirmed. Opinion filed December 21, 1895.

D. J. SCHUYLER and C. W. GREENFIELD, attorneys for appellants.

H. M. STEELY, attorney for appellee.

OPINION PER CURIAM.

This was a motion to retax costs in an action at law.

This appeal was designed to question the correctness of the rulings and decision of the court upon the motion.

But the bill of exceptions contains only the evidence, and therein is no allusion to any ruling, finding, or decision of the court, or to any exception whatever.

In all respects the record is the same as in First Nat. Bank, etc., v. Lake Erie and Western Railroad, decided at this term.

For reasons stated in the opinion filed in that case, we are here precluded from reviewing the alleged errors of the trial court.

Judgment affirmed.

63 576  
63 576

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**First National Bank, for the use of, etc., v. Lake Erie  
and W. R. R. Co.**

1. **EXCEPTIONS—How Preserved.**—Exceptions can only be preserved by a bill of exceptions properly signed and sealed by the judge.

**Retaxation of Costs.**—Appeal from the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the May term, 1895. Affirmed. Opinion filed December 21, 1895.

D. J. SCHUYLER and C. W. GREENFIELD, attorneys for appellant.

H. M. STEELY, attorney for appellee.

## OPINION PER CURIAM.

Appellant entered a motion in the trial court for retaxation of certain items of cost, taxed in an action at law, and by this appeal seeks to bring before us for review the action of the court upon its motion.

The bill of exceptions contains the evidence, but nothing more. It does not appear, therefore, that the court made any ruling, finding or decision whatever, or that exception or objection of any nature or kind was interposed.

The mode of assigning error in actions at law is regulated by statute, and the right can be exercised only where the decision or ruling sought to be brought before the court for review was excepted to in the trial court. Secs. 61 and 62, Chap. 110, R. S., entitled "Practice;" James v. Dexter, 113 Ill. 654.

Exceptions can only be taken and preserved by a bill of exceptions signed and sealed by the judge. The clerk is without power to certify thereto. James v. Dexter, *supra*.

We are precluded from reversing the alleged errors. Parson v. Evans, 17 Ill. 238; Daniel v. Shields, 38 Ill. 197; Force Manf. Co. v. Horton, 74 Ill. 110; James v. Dexter, *supra*; Nat. Bank v. LaMoyne, 127 Ill. 253.

The judgment must be affirmed.

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**James M. Harris v. F. H. Wemple et al.**

1. CHATTEL MORTGAGES—*When Fraudulent in Law*.—A provision in a chattel mortgage that the mortgagor may retain possession of the mortgaged property and keep and use the same, when the property is of such a nature that it will necessarily be consumed and destroyed by any legitimate use which may be made of it, renders the mortgage fraudulent as a matter of law, and void as to third persons.

2. SAME—*Provisions not Executed, Unavailing*.—The fact that the mortgagor has not exercised the right to use the mortgaged property, where such use necessarily implies the consumption of the same, is of no avail to relieve the mortgage of the legal imputation of fraud.

**Voluntary Assignments**.—Appeal from the County Court of Sangamon County; the Hon. CHARLES P. KANE, Judge, presiding. Heard in

this court at the May term, 1895. Affirmed. Opinion filed December 6, 1895.

STATEMENT OF THE CASE.

Appellant held a chattel mortgage, given by one Charles E. Reynolds, on ten horses, a cow and heifer, 1,800 bushels of corn, 340 bushels of oats and divers farming implements.

Appellees were creditors of Reynolds and claimed liens upon the property superior to the mortgage lien.

The County Court upheld appellant's lien upon all the mortgaged property except the corn and oats, and as to those articles, held the mortgage fraudulent and void as to creditors.

This ruling was based upon the construction given by the court to the following clause in the mortgage, viz.:

"And provided also, that it shall be lawful for said mortgagor, executors, administrators and assigns, to retain possession of the said goods and chattels, and at his own expense to keep and use the same until he or his executors, administrators or assigns, shall make default in the payment of the said sums of money above specified, either in principal or interest, at the time or times and in the manner hereinbefore stated."

The appellant by this appeal questions the correctness of the judgment of the court as to the corn and oats.

CONNOLLY & MATHER, attorneys for appellant.

CONKLING & GROUT, attorneys for appellees.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

Corn and oats, it is manifest, will be consumed and destroyed by any use that may be made of them.

In Illinois, a provision in a chattel mortgage giving the mortgagor power to retain possession and dispose of the mortgaged property at his pleasure, renders the mortgage fraudulent as a matter of law, and void as to third persons.

Power to dispose of mortgaged property is as effectually given by a provision which empowers the mortgagor to



consume and destroy it by use as by one which authorizes him to dispose of it by bargain and sale, and each is equally obnoxious to the policy of our law, relative to such securities.

The fact that the mortgagor did not exercise the power except to the extent of feeding the corn and oats to the mortgaged stock, can not avail to relieve the instrument of the legal imputation of fraud.

This imputation arose because the mortgage reserved to the mortgagor an unlawful power to use and dispose of the property. Whether the mortgagor exercised this power in whole or in part was wholly inconsequential.

Perhaps authority to use mortgaged grain by feeding it to stock covered by the same mortgage, would not render the mortgage objectionable as matter of law. Whether it could amount to a fraud in fact would be a question dependent upon the circumstances of the particular case. But unlimited power to use property which must be consumed by use can only be regarded as a fraud in law as against third persons in Illinois.

In Indiana and other jurisdictions where the legal imputations of fraud which here obtain are excluded by statute, and the question declared to be one of fact, a different rule prevails.

Hence the decisions of the courts of those jurisdictions are not applicable.

The judgment must be and is affirmed.

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William Mellor et al. v. Wm. Carithers et al.

68	579
74	456

1. *ESTOPPEL—To Deny Partnership.*—One who permits himself to be treated as a partner will be estopped to dispute the partnership.

2. *SAME—Where the Estoppel Does Not Exist.*—It is immaterial what the community or general public may have believed or understood, if the persons dealing with the alleged partners were not misled by their acts, there is no estoppel to assert that they were not partners.

*Assumpsit, on promissory notes, etc.* Appeal from the Circuit Court of Fulton County; the Hon. JEFFERSON ORR, Judge, presiding. Heard

in this court at the May term, 1895. Reversed and remanded. Opinion filed December 21, 1895.

S. B. MONTGOMERY, KINSEY THOMAS, WM. PRENTISS and T. J. SPARKS, attorneys for appellants, contended that before defendants can be held liable on the ground of holding out or permitting themselves to be held out as partners in the firm of J. Mershon & Co., it must appear from the evidence that plaintiffs knew of such holding out; that they believed the truth of the report or notice, and that as ordinarily reasonable and prudent men they relied upon it and extended the credit and made the loan on the faith of such information. *Thompson v. Bank*, 111 U. S. 529; *Lindley on Partnership*, Sec. 43 *et seq.*; *Ward v. Pennel*, 51 Me. 52; *People v. Brown*, 67 Ill. 435; *Ball v. Horton*, 85 Ill. 159; *Central City Bank v. Walker*, 66 N. Y. 424; *Irwin v. Conklin*, 36 Barb. 64.

The liability can only be predicated upon the principle of equitable estoppel, and parties who attempt to claim the benefit of this estoppel must show that they were ignorant of the truth in regard to the representation, and they must have been permissibly ignorant and destitute of any convenient and available means of acquiring knowledge thereof. If they knew, or under all the circumstances ought to have known, the fact, the estoppel falls to the ground. *Bigelow on Estoppel* (5th Ed.), 626; *Shipley v. Fox*, 69 Md. 572-9; *Brant v. Coal and Iron Co.*, 93 U. S. 327; *Steel v. St. Louis Smelting Co.*, 106 U. S. 447; *Crest v. Jack*, 3 Watts 240; *Knouff v. Thompson*, 4 Harr. 361; *Lawrence v. Brown*, 5 N. Y. 394; *Bigelow v. Topliff*, 25 Vt. 273; *Carter v. Champion*, 8 Conn. 554; *Am. and Eng. Enc.*, Vol. 7, p. 15; *Williams v. Wadsworth*, 51 Conn. 277; *Lash v. Rendell*, 72 Ind. 475; *Shellock v. Gilbert*, 23 Minn. 373; *Robbins v. Potter*, 98 Mass. 532; *Kingman v. Graham*, 51 Wis. 232; *Trenton Banking Co. v. Duncan*, 86 N. Y. 221; *Wright v. McPike*, 70 Mo. 175.

To render an incoming member of a firm liable on an old debt of the firm of which he has become a member, there must be a novation of the debt, or an agreement sanctioned

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by all the copartners for a legal consideration, to discharge the old firm from their liability to the creditor, and make the debt an obligation of the newly constituted firm. Lindley on Partnership, 2d Ed., 208 and note; Bates on Partnership, par. 507; Story on Partnership, Secs. 151-3; Collyer on Partnership, 361; Sheriff v. Nilks, 1 East 48; Stermberg v. Callahan, 14 Iowa 251; Parmelee v. Weggenhorn, 6 Neb. 322; McKinney v. Alvis, 14 Ill. 14; Watt v. Kirby, 15 Ill. 200; Goodenow v. Jones, 75 Ill. 48; Wright v. Brossman, 73 Ill. 381; Wittram v. Van Wormer, 44 Ill. 525; Fuller v. Row, 56 Barb. 344; Kountz v. Holthmish, 85 Pa. St. 235.

The holding out, to make one liable, must be before the contract. Bates on Partnership, Sec. 91 and cases cited. Baird v. Plaque, 1 Fos. & Fin. 344; Lindley on Partnership; Rimel v. Hayes, 83 Mo. 209.

Estoppel being the sole ground upon which a person can be charged as a partner by holding out, and not the doctrine of a holding out to the world independent of the plaintiff's knowledge, it would follow that acts of holding out of which the plaintiff was unaware can not be admitted, even to corroborate the acts known and relied upon. The plaintiff can not show all the acts of the defendant and prove afterward what came to his knowledge. Bates on Partnership, Sec. 98; Rimel v. Hayes, 83 Mo. 200-209.

H. W. MASTERS and JOHN A. GRAY, attorneys for appellees, contended that some respectable authorities permit proof of "current report" and "reputation" to show that a party acted in "good faith" in giving credit to the "new men." Uhl v. Harney, 78 Ind. 26; Benjamin v. Covert, 47 Wis. 384.

OPINION PER CURIAM.

This case was here at a former term, (52 Ill. App. 86,) and was then reversed for reasons stated, which applied specially to Samuel Chipman, one of the appellants at that time.

Having been remanded, the case was tried again. The

item of the draft was eliminated and the contention related solely to the certificate of deposit.

During the trial the plaintiffs dismissed as to defendant Chipman. The issues were found for the plaintiffs, damages assessed at the amount of the certificate of deposit and interest, but pending a motion for new trial the plaintiffs remitted \$1,296.44, the amount of a dividend in their favor received from the assignees of J. Mershon & Co., and thereupon the court overruled the motion for new trial and rendered judgment for the plaintiffs in the sum of \$1,955.44, from which the present appeal is prosecuted.

It was not contended that the appellants were in fact members of the firm of J. Mershon & Co., but by their conduct they had so held themselves out to the appellees, who, acting upon the belief reasonably produced by the conduct of appellants, extended the credit in question to the firm on the strength of such belief that appellants were indeed members of the firm. In other words, the position is that appellants are estopped to deny that they were such partners. Such was the position on the first trial and manifestly it is essential to a recovery since the appellants were not, as between themselves and the Mershons, partners at the time the certificate of deposit was issued, May 10, 1892.

The certificate was antedated, as of May 6th, in order to include interest on a check of some \$1,500 which the appellees had received from Chipman on the 29th of April (or May 2d), and had not collected, and which was a part of the consideration for which the certificate was issued. It is proper to refer at this point to the suggestion by appellants that liability on this check constituted an indebtedness of the old firm for which in no event could the alleged new members be bound without their express consent. It would seem a sufficient answer (aside from the fact of the renewal and extension of credit for one month) that the check was not received by appellees until after they were advised of the published notice of the partnership on which they rely. So that if what they so rely upon is enough for their purpose it would secure them in the amount of this check as

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Mellor v. Carithers.

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well as the other item which made up the sum of the certificate, for the reason that as shown by the record no additional facts came to their knowledge upon which to predicate their claim of estoppel. It may be said, no further facts came to their knowledge after they received the check, because the circular which Wm. Carithers says he received between the 3d and 5th of May was in substance identical with the notice which he had seen in the Chronicle before he received the check.

That publication was to the effect that the appellants (and Chipman) and the Mershons had formed a copartnership for the purpose of carrying on the banking business under the name and style of J. Mershon & Co., bankers, and that having succeeded to the business theretofore carried on by J. Mershon & Co., they solicited patronage in that line, etc.

This notice was prepared by Mellor and Henry Mershon with the assistance of Durell. The other appellants did not know of it at the time though there is evidence tending to show that some of them afterward assisted in distributing the circulars. It seems pretty clear that one or more of them never had anything whatever to do with the newspaper publication or the circular, but that this was the work exclusively of Henry Mershon, Durell, and some only, but not all, of appellants.

The most important question is how far the appellants, all, or any of them, should be estopped to deny as against the appellees, the implication of partnership established by said publications. Chipman's name was signed and appeared the same as the others, but clearly without any authority from him, as he informed appellees the day he gave them the check. It is not doubtful that appellees understood that Chipman was really not committed to the enterprise at that time, and if his account of the conversation is correct, they must also have understood or at least might well have inferred that the whole matter was merely in progress and that nothing definite had so far been done. The subsequent conduct of appellees in withdrawing their time

deposit of \$4,000, and forfeiting the interest thereon, and the reason they assigned for doing so, and for leaving the amount of the certificate, which, with interest, would soon mature, and the admission afterward made to Chipman as to the substance of the conversation at the time of the giving of the check, all tend very strongly to support the position that the appellees knew that no partnership had really been formed, and that what had been done was incomplete and conditional; that the business was still carried on by the old concern and that the appellees at the time the certificate of deposit was issued had unshaken confidence in the solvency of the firm. The impression is quite reasonably produced by a reading of all the proof that appellees would not have taken the certificate if they had then suspected the firm was not sound. What Chipman told them was enough to put them on inquiry as to whether the appellants had indeed entered the firm, and the fact they made no such inquiry very strongly tends to show they had no apprehension as to the firm and therefore did not rely upon the appellants in respect to this certificate of deposit.

Since, then, the appellees must depend upon the facts, substantially as above stated, to establish the proposition of partnership by estoppel as against the appellants, it is difficult to see how they obtained their verdict, unless the jury were misled and confused by other testimony, not really important or relevant, of which a good deal is to be found in the record. Reference is here made to the proof of various declarations by several of the appellants at different times as to what had been done, or would be, in the matter of the rehabilitation of the old bank or the establishment of a new one, and the legal responsibility of the appellants in that behalf. These declarations were not made to the appellees, and were not reported to them until after they took the certificate of deposit, nor if, indeed, ever, before the suspension, and, of course, could not form the basis of any credit or confidence extended by them to the bank on account of the supposed connection of appellants.

Yet such proof probably had great effect upon the jury.

Dixon v. The People.

It was error to admit proof of any such declarations of which appellees were not informed before the certificate of deposit was issued.

Here may be noticed the peculiar terms of some of the instructions given for the appellees, by which the jury were told that persons may be regarded as partners, as to third persons, if they so conduct themselves as to justify the public, or persons dealing with them, in believing they are partners.

It is immaterial what others than those who dealt with them, and who are complaining against them, may have been induced to believe. No matter how the rest of the community may have understood it, if the plaintiffs were not misled by the act of the defendants, there is no estoppel to assert that they were not partners. It is true that in some of the instructions given at the instance of the appellants, this point was presented to the jury with all needed clearness, but it is hardly probable that the mischief was thereby corrected.

Complaint is made of a modification of instruction No. 1, asked by appellants, by which, as is assumed, the jury were told that the plaintiff must recover against all the defendants, omitting the words, *if any*. The jury were presumably not misled by this instruction when taken in connection with the others relating to the same branch of the case. Other objections presented in the brief are not discussed, because not deemed of special importance, as they will, no doubt, be obviated on another trial.

The judgment is reversed and the cause remanded.

J. N. Dixon v. The People.

1. CONTEMPT OF COURT—*Physicians as Expert Witnesses—Demand of Fees.*—A physician called as an expert witness in a case about the facts of which he knows nothing, can not insist upon the payment of a fee for his opinion before answering a hypothetical question propounded to him, calling for his professional opinion upon the assumed state of facts contained in the question.

63	585
108	179
63	585
99	422

**Contempt of Court.**—Error to the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the May term, 1895. Affirmed. Opinion filed December 21, 1895.

CONKLING & GROUT, attorneys for plaintiff in error, contended that, in a civil suit for damages, a physician, who knows nothing of the facts, and who is called as an expert only, to answer a hypothetical question, the answer to which calls for a professional opinion based on his experience and study, and who refuses to answer because no compensation for testifying, other than ordinary witness fees, has been promised or provided for, but which has been expressly refused, can not be compelled to so testify, nor should he be held to be in contempt of court for so refusing.

Expert evidence is that given by one specially learned, skilled or experienced in the subject to which it is applicable, concerning information beyond the range of ordinary knowledge, observation and experience. Am. and Eng. Ency. of Law, Vol. 7, p. 491; Rogers on Expert Testimony, p. 13; Hopkins v. Indianapolis & St. Louis R. R. Co., 78 Ill. 32; C. & N. W. Ry. Co. v. Adams, 108 Ill. 577; Hamilton v. Des Moines R. R. Co., 36 Iowa 31; Muldoway v. Des Moines R. R. Co., 36 Iowa 702; Citizens Gas Light & Heating Co. v. O'Brien, 15 Ill. App. 400.

The ordinary affairs of life, or such as men in general are capable of comprehending and understanding, can not be subject of expert testimony. Pennsylvania Co. v. Conlan, 101 Ill. 93; Am. and Eng. Ency. Law, *supra*; Linn v. Sigbee, 67 Ill. 75; Hopkins v. Indianapolis & St. Louis R. R. Co., 78 Ill. 32; Rice on Evidence, Vol. 1, Chap. 10, Sec. 195.

An expert is one who has made the subject upon which he gives his opinion a matter of particular study, practice or observation, and he must have a particular and special skill, experience or knowledge of the subject. 7 Am. and Eng. Ency. Law, 491; 1 Rice on Evidence, Chap. 9, Sec. 194; Anderson's Law Dictionary; Reynolds on the Theory of the Law of Evidence, Sec. 52, citing Stephen's Evidence, Art. 49; Best's Evidence, Sec. 513.

The weight of authority is that an expert can not be com-



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pelled to give a professional opinion without compensation. Anderson's Law Dictionary.

It has been a matter of grave discussion whether an expert is bound to testify on matters of *opinion* without extra compensation, the weight of decisions being that he is not bound to do so. Bouvier's Law Dictionary.

The English practice is now settled that extra compensation to scientific witnesses may be taxed. Lawson on Expert Evidence, citing *Batley v. Kynock*, L. R., 20 Eq. Cas. 632 (1875); *In re Laffitte*, 20 Eq. Cas. 650 (1875).

JAMES M. GRAHAM, state's attorney, for defendant in error.

Contempt of court is a disobedience to the rules or orders of the court which interferes with the due administration of the law. 3 Am. & Eng. Ency. 777.

A court of record has power to punish, for contempt, a witness who refuses to answer a question determined by the court to be proper. Such power is necessarily implied in the establishment of a judicial tribunal. Whar. Cr. Ev., Sec. 450; Bish. Stat. Cr. (2d Ed.) 137.

And the exercise of this power is entirely in the discretion of the court, and will not be re-examined except when the proceedings are so grossly defective as to be void. 3 Am. & Eng. Ency. 800.

The presumption is in favor of the validity of the court's action. If an expert claims that he is exempt from the general rule concerning witnesses the burden is on him to establish the exception. Rogers' Expert Ev., 427 (2d Ed.).

At common law no witness fees were paid, and in the absence of a statute authorizing it, no fees can now be taxed as costs or recovered. *Fish v. Farwell*, 33 Ill. App. 244; 1 Gill. 165; *Constant v. Matteson*, 22 Ill. 560; *Eimer v. Eimer*, 47 Ill. 375; *Smith v. McLaughlin*, 77 Ill. 597; *In re Attorney-General*, 103 Mass. 542; *Com'rs, etc., v. Lorimer County*, 32 Pac. Rep. 841. And statutes allowing costs, being in derogation of the common law, must be strictly construed. 23 Am. & Eng. Ency. 387; *Cadwallader v. Harris*, 76 Ill. 370.

Until the matter is settled by statute the practice which has hitherto prevailed in Illinois must continue, as "no principle is better established than that all merely private interests are subordinate to the public welfare." *Metcalf v. City Co.*, 87 Ill. 318.

OPINION PER CURIAM.

The appellant, a physician and surgeon, was brought into the Circuit Court of Sangamon County by the ordinary process of subpoena to testify as a witness in behalf of the defendant in a case then pending against the city of Springfield, brought to recover damages for personal injuries, which the plaintiff alleged she had received from a fall upon a defective sidewalk.

The appellant knew nothing whatever of the facts of the case, and he declined to answer a hypothetical question propounded to him calling for his professional opinion upon the assumed state of facts mentioned in the question, except upon the payment of a fee of \$10.

He persisted in such refusal, and the court ruled he was in contempt and assessed a fine against him.

It is conceded the fee demanded was reasonable in amount and no question is raised in the brief as to the power of the court to inflict a fine as punishment for contempt in refusing to answer any question which the law required the witness to answer, and therefore the sole question presented is, could the appellant, under the circumstances, lawfully decline to give his professional opinion without reasonable compensation?

As far as we are advised, the question has never been directly passed upon in Illinois.

Nor can any rule be drawn from the current of judicial decisions in other jurisdictions, or from a concurrence in the views of text writers, so widely at variance and so directly in conflict are the opinions of different courts and law writers upon the subject.

It is not contended the reasonable compensation demanded by the appellant could be taxed as costs, but that the party

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desiring his professional opinion should be required to compensate him therefor before the law should compel him to express that opinion for the benefit of such party.

We think the court ruled correctly in holding the law required the witness to answer the question.

The statute has fixed the compensation to be paid all witnesses, and the law requires every person, without regard to his calling or engagements, to appear as a witness when duly subpoenaed and to accept as full compensation the statutory allowance, however inadequate it may be.

The administration of justice in the adjustment of the contentions growing out of the business affairs or concerning mere private, personal or property rights of its citizens, is one of the most important sovereign duties devolving upon the State. Upon the performance thereof depends the public peace and tranquillity, and the safety and security of the property, reputation, person and family of every private citizen. Every citizen is therefore deeply interested in the proper discharge of that duty. It can only be discharged through the medium of judicial tribunals. Without the power to compel witnesses to attend and disclose facts in their knowledge pertinent to these contentions, these tribunals are powerless to perform their functions. No distinction can, we think, be drawn between different kinds of knowledge, nor can a witness decline to make known facts which have come to his knowledge, either by observation or study and experience, upon the ground he can use such facts or knowledge for his pecuniary benefit in the business affairs of life, when the disclosure thereof is important to the attainment of justice in the courts.

No reason is perceived why compensation beyond that fixed by the general laws of this State should be allowed to this class, or to any one class of experts, unless it is allowed to every other class, of which there are many. Some works on expert testimony enumerate as many as seventy classes of expert witnesses.

To hold that each member of these different classes of witnesses may lawfully demand that litigants shall arrange for the payment of reasonable compensation before he can be

compelled to disclose in open court, facts in his knowledge relating to the right and justice of causes there pending for determination, would be impracticable, and would often operate to subject a litigant to financial burdens so great as to practically deny him a hearing in the courts; would tend to make the administration of the law depend upon the financial ability of the suitors to compensate witnesses in order to have the benefits of facts in their knowledge, and to bring such testimony into discredit, as having been purchased, and to attach scandals and grave suspicions to expert witnesses and expert testimony.

Nor does the rule requiring experts to testify for legal fees, deprive the witness of his property for public use.

Knowledge gained by study, observation and experience is not property within the meaning of the word as used in section thirteen, article two of the constitution, wherein it is provided that private property shall not be taken or damaged for public use without just compensation.

The word, in its appropriate sense, means tangible things and rights which accompany or are incident to the use, enjoyment or disposition of such things. See authorities collected in Note 1, page 294, 19th volume Amer. & Eng. Ency. of Law.

In *C. W. I. R. R. Co. v. E. C. R. W. Co.*, 115 Ill. 385, it was said, "property itself, in a legal sense, is nothing more than the exclusive right of possessing, enjoying and disposing of a thing."

The ordinance of 1787 has no operative force in this State, except so far as its principles are embodied in the constitution. *The People, etc., v. Thompson*, 155 Ill. 451.

The judgment is affirmed.

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### William Grabbs v. City of Danville.

1. ORDINANCES—*Lawful Discriminations*.—An ordinance regulating the sale of intoxicating liquors is not void because it discriminates against malted and in favor of spirituous and vinous intoxicants.

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Grabbs v. City of Danville.

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**Debt.**—For violation of an ordinance. Appeal from the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the May term, 1895. Affirmed. Opinion filed December 6, 1895.

## STATEMENT OF THE CASE.

The appellant was convicted, of and fined for the violation of an ordinance of the appellee city, which is as follows :

7. An Ordinance Licensing Brewers and Beer Agents.—Be it ordained by the city council of the city of Danville. Sec. 1. That no brewer, beer agent, or any person or persons, firm, association or corporation, shall sell, offer, barter, exchange, deliver, or offer so to do, any malted intoxicating liquors in quantities of one gallon or more at a time, within the corporate limits of said city, without having obtained from said city a license therefor, under a penalty of not less than twenty dollars for each offense; *provided*, that any person, firm, association or corporation having a dram shop license from the city shall not be required to pay under this ordinance.

Sec. 2. The rate of such license shall be fifty dollars for three months, payable in advance, and before such license is granted the applicant shall execute a bond in the penal sum of three thousand dollars, payable to the People of the State of Illinois, and also a bond to the city of Danville in the sum of one thousand dollars, each bond with at least two good and sufficient sureties, freeholders in Vermilion county, Illinois, approved by the mayor and city council; the former being conditioned that such license shall pay to any and all persons any damages that they may sustain, either in person or property, or means of support, by reason of the selling or giving away of such intoxicating liquor by such licensee, and the latter to be conditioned that such licensee shall observe and obey all laws of this State and all ordinances of this city, with reference to selling, giving away and delivering of such intoxicating liquor in quantities of one gallon and more.

Sec. 3. Application to be made in same manner and to be issued like licenses for dram shops."

The case against the appellant was submitted to the court on agreed statement of facts as follows :

That defendant was, September 1, 1894, a beer agent, selling in quantities of one gallon and more, malted, intoxicating liquors within said city; that there then was and had been in force, for more than ten days prior thereto, an ordinance, a copy of which is hereto attached and made a part of this statement.

That defendant had not a license to sell said liquor, as provided by said ordinance, and was then and there selling the same contrary to the provisions of said ordinance.

It is agreed that if said ordinance is valid defendant is guilty; otherwise, not guilty.

Further agreed that at and since the time of the passage of said ordinance persons have been selling vinous and spirituous liquors in quantities of one gallon or more, at wholesale in said city, and that there is not an ordinance of said city providing for license for selling the same as aforesaid.

Thereupon the court, after hearing the arguments of counsel, finds that said ordinance is valid, that defendant is guilty of its violation, and that he be adjudged to pay a fine of \$20 and costs of suit, for which execution shall issue, to which finding and judgment defendant then and there duly excepted.

LAWRENCE & LAWRENCE, attorneys for appellant.

G. F. REARICK, city attorney, for appellee.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

Under the operation of the ordinance of the city vinous and spirituous intoxicating liquors may be sold in quantities of one gallon and more without restraint of any character, but sales of malted intoxicating liquor in like quantity is prohibited, except upon the exaction of a license fee and the execution of bonds, etc.

Therefore, it is argued, the ordinance involved here un-

## McNulta v. Corn Belt Bank.

lawfully discriminates against malted and in favor of spirituous and vinous intoxicants.

We think the discrimination is not necessarily unlawful.

It is in virtue of the police power of the State, delegated to the city, that such ordinances are passed and upheld.

The police power is authority and right to enact statutes and ordinances necessary, in the view of the law-making body of the State or a city, to preserve the public order and tranquillity, and promote the public health, safety and morals.

The traffic in and use made of one intoxicant may be more pernicious and harmful to the public peace and health or morals than another.

Hence the power may be rightfully exercised by ordinance against the one and not against the other.

Whether one intoxicant is the more pernicious, and its use ought for that reason be subjected to greater restraint, is a question depending upon a variety of circumstances requiring the exercise of judgment and discretion on the part of the city council in the discharge of their legislative functions under the delegation of power to license, prohibit or regulate sales of such liquors in the city.

Their action is conclusive of the question. See *North Chicago R. R. Co. v. Lake*, 105 Ill. 207.

We think the ordinance valid. The judgment is affirmed.

## John McNulta v. Corn Belt Bank.

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1. BANKS AND BANKING—*A Bank can not Bind Itself to Issue Stock in the Future.*—A resolution adopted by a bank organized under the statute fixing the salary of the president, and providing in consideration for his acceptance of the office “for an additional sum equal to two and one-half per cent on all stock to be issued, payable at the time fixed for such issues, that is to say, at least one hundred thousand dollars par value of the said stock is to be issued within one year after the opening of the said bank for business, and another additional one hundred thousand dollars, making three hundred thousand dollars in all that is to be issued,

including the first issue of one hundred thousand dollars, within two years from that date," establishes no binding obligation upon the bank to issue the stock.

2. *SAME—Officers no Power to Bind the Bank to Issue Stock.*—Neither the stockholders nor directors in a State bank have power in either capacity to bind the bank to issue stock or to authorize the directors in their discretion to increase the capital stock by several distinct issues.

3. *SAME—Issue of Stock, Question of Policy.*—Whether, when and in what amount the increase of the capital stock of a State bank shall be made, are questions of policy to be determined by the stockholders, and not by the directors.

4. *SAME—A Creature of the Statute.*—A State bank has only a statutory existence, and can exercise its powers and franchises only in the manner provided by the law under which it is organized; and where one mode is prescribed by the law, any attempt to exercise its powers in any other mode is impliedly forbidden.

5. *SAME—Increase of Capital Stock.*—The statute relating to banks and banking prescribes the manner in which the capital stock of a State bank may be increased and contemplates no other manner or means of accomplishing the same; it can therefore be done only in the one way prescribed.

6. *SAME—Stock not to be Increased in Unfixed Parcels.*—The stockholders can not by one vote decide upon an increase of an aggregate amount of capital stock in unfixed parcels at unfixed times, distributed and running through a future period, without regard to the judgment or will of those who in the meantime may become stockholders.

7. *SAME—Rights of Stockholders not to be Restricted.*—A by-law of a State bank providing that all the stock sold or transferred should be with the express condition that it will be voted in favor of all propositions submitted by the board of directors to increase the capital stock, that it should become a part of every contract for the transfer of stock and operate as a reservation of a limited ownership of the stock transferred, to the extent of the provisions thereof, and made binding on the transferee by the acceptance thereof, is void.

8. *SAME—Province of the Stockholders.*—The stockholders of a State bank are the constituent members of the body; they own the capital stock and other corporate property, and dictate the policy by which its business is conducted, but they have no power, by agreement or otherwise, to change in any respect the organic law.

9. *SAME—Rights of Holders of Stock—Transfers.*—The right of a shareholder to transfer his stock without condition or limitation is one of vital importance, and all unreasonable attempts to restrain it are void as against public policy, and although an agreement between the shareholders or a part of them, not to sell except on certain conditions may be valid, if it does not amount to an unreasonable restraint of trade; but their right can not be restrained by a by-law of the corporation.

10. *ULTRA VIRES—When Not Available as a Defense.*—Where a con-



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tract made by a corporation with an individual is *ultra vires* as concerns the corporation, but has been in good faith wholly or in part executed by the individual, so far as executed the doctrine of *ultra vires* is not a defense.

**Assumpsit**, common counts. Appeal from the Circuit Court of McLean County; the Hon. CYRUS EPLER, Judge, presiding. Heard in this court at the May term, 1895. Affirmed. Opinion filed December 10, 1895.

ROWELL, NEVILLE & LINDLEY and WELTY & STERLING, attorneys for appellant.

The statute under which the defendant was incorporated gave its directors power to fix the salary of the president and to fix it at the time the resolution involved in this suit was adopted. Banking Act of 1887, Sections 1, 2, 3, 4 and 5.

Judicial decisions go to the extent of holding that a payment of a salary to a president without a resolution or by-law fixing a salary before the services are performed, or before he enters upon the duties of an office, is illegal. The converse would therefore be that a corporation by resolution or by-law may authorize compensation to its president for services and other duties required of him. *Ellis v. Ward*, 137 Ill. 509.

A stockholder, president, director or other officer, may enter into contracts with his corporation. *Pierce on Railroads*, Sec. 31; *Heart et al. v. Brown et al.*, 77 Ill. 226; *Beach et al. v. Miller*, 130 Ill. 169; *Morawetz on Corporations*, 527; *Budd v. Walla Walla P. & Co.*, 2 Wash. 347.

Acts done by promoters of a corporation, subsequently approved by the corporation, and the benefits thereof received, are binding. *Cook on Stockholders*, Sec. 207 and notes; *Woods v. Whellan*, 93 Ill. 153; *McDonough v. Bank*, 34 Texas 309; *Whiting v. Wyman*, 101 U. S. 392; *Bommer v. The American, etc., Mfg. Co.*, 81 N. Y. 468; *Balette v. Northwestern, etc., Co.*, 37 Minn. 89.

A corporation can not avail itself of the defense of *ultra vires* where the contract has been in good faith performed by the other party to it and the corporation has had the benefit of the contract and of the performance. *Bradley v. Ballard*, 55 Ill. 413; *Darst v. Gale*, 83 Ill. 136; *People's*

Gas Light and Coke Co. v. Chicago Gas Light & Coke-Co., 20 Ill. App. 494; First National Bank v. Brooks, 22 Ill. App. 248; Benefit Association v. Blue, 120 Ill. 121.

The plea of *ultra vires* should not, as a general rule, prevail, whether interposed for or against a corporation, when it would not advance justice, but on the contrary would accomplish a legal wrong. Whitney Arms Co. v. Barlow et al., 63 N. Y. 62.

The courts will, as a general rule, presume that contracts made by a corporation which appear to be designed to promote its legitimate and profitable operation are within the limits of its powers, and if their validity be assailed the burden will be on the assailant. Ellerman v. Junction Ry. Co., 23 N. J. Ch. 287.

The fact that the president was present when salary was voted, did not affect the validity of the vote. Hax v. Davis Mill Co., 39 Mo. App. 453.

So long as honesty and good faith concur, the expediency of a contract made by the managers of a corporation in its behalf is for their determination and their decision concludes the corporation. Park v. Grant Locomotive Works, 40 N. J. Eq. 114.

A contract may be ratified by the stockholders of a corporation. Kelly v. Newburyport, etc., Co. v. Oregon Ry. and Navigation Co., 28 Fed. Reporter 505.

For duties not strictly within the ordinary functions of the office a reasonable compensation can be recovered. Edwards v. Fargo & S. Ry. Co., 33 N. W. Rep. 100.

JOHN E. POLLOCK and A. J. BARR, attorneys for appellee, contended that the board of directors had no power to contract with McNulta that \$300,000 of stock should be issued. The stockholders alone had the power to say whether the capital stock of the bank should be increased. Starr & Curtis' Statute, Vol. 3, page 110, Sec. 42.

An *ultra vires* contract can not be ratified by the stockholders. Thomas v. The Railroad Co., 11 Otto 83.

A director owning a majority of the stock can not contract with himself. Miner v. Belle, 93 Mich. 97.

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The directors had no power to pay appellant for his services as promoter, which they sought to do by allowing him the two and one-half per cent. *Ellis v. Ward*, 137 Ill. 509; *Cook on Stock and Stockholders* (3d Ed.), Vol. 2, Sec. 657.

The question of *ultra vires* is properly raised upon the plea of *non est factum* and objections to the testimony. *B. S. Green Co. v. Blodgett*, 49 Ill. App. 180.

The doctrine of *ultra vires* should not, as a general rule, prevail, whether interposed for or against a corporation, when it would not advance justice, but on the contrary would accomplish a legal wrong. *Kadish v. Garden Ass'n*, *Chicago Legal News* of date April 7, 1894, Ill.; *Hubbard v. New York Investment Co.*, 14 Fed. Rep. 676.

The contract or resolution, so-called, was not only *ultra vires*, but void. *Penn v. Borman et al.*, 102 Ill. 523; *Davis v. Old Colony*, 131 Mass. 259.

As president, appellant participated in the meeting where the resolution was adopted, and the same was invalid for that reason. *Wickersham v. Crittenden*, 28 Pac. Rep. 791, and cases cited; *Kelsey v. Sargent*, 40 Hun 151; *Bearse v. N. Y. Life Ins. Co.*, 66 Hun 67.

FIFER & PHILLIPS, of counsel for appellee, contended that it is not within the general power of directors to release an original subscriber to capital stock, or to make any arrangement with him by which the company, its creditors, or the State, shall lose any of the benefits of his subscription. Every such arrangement is regarded in equity, not merely as *ultra vires*, but as a fraud upon other stockholders, upon the public, and upon the creditors of the company. *Burk v. Smith*, 16 Wall. 390, 395; *Bedford R. R. Co. v. Bowzer*, 48 Pa. St. 29; *Melvin v. Lamar Ins. Co.*, 80 Ill. 446; *Osgood v. King*, 42 Iowa 478.

Whenever the board passed beyond their legitimate province of fixing the president's salary, their action could at best amount to no more than a contract made with appellant to sell stock for the bank; and a contract made with a cor-

poration in which a director of a corporation is interested, either directly or indirectly, is voidable at the instance of the company or of the stockholders. *San Diego v. San Diego R. R. Co.*, 44 Cal. 106; *Rice's Appeal*, 79 Pa. St. 168; *Alford v. Miller*, 32 Conn. 543; *Port v. Russell*, 36 Ind. 60; *Van Cott v. Vun Brunt*, 2 Abb. N. C. 283; *Pacific R. R. Co. v. Seeley*, 45 Mo. 212; *Cook v. Berlin Woolen Mill Co.*, 43 Wis. 433; *U. S. Rolling Stock Co. v. Atlantic R. R. Co.*, 34 Ohio 450; *Smith v. Skeary*, 47 Conn. 47.

And this is so whether the director entered into the contract in its inception, or subsequently acquired an interest in it. *Lyon v. Lawrence, etc.*, 21 Kas. 365; *European Ry. v. Poor*, 59 Me. 277.

It is evident from this whole transaction and its surroundings that the appellant sought this bonus as a compensation to himself for his services as a promoter of the corporation. Such services can not, however, be paid for out of the funds of the bank; and, if agreement has been made to pay for such services, the agreement may be repudiated at any time. *N. Y. R. R. Co. v. Ketchum*, 27 Conn. 170; *Rockford R. R. Co. v. Sage*, 65 Ill. 328.

Directors voting stock to themselves in compensation for selling corporate stock, are liable for the value of the stock. *Assignee v. Stine*, 15 Phil. 37.

Nor could the board of directors legally agree to pay him for services which had already been rendered without any contract for compensation.

A salary or back pay voted to a director after the services have been rendered, can not be enforced. It is invalid and void. It is the same as giving away the assets of the corporation. 2 *Cook, Stock and Stockholders*, p. 923, Sec. 657; *Lafayette, etc., v. Cheney*, 87 Ill. 446; *Cheney v. L. B. & M.*, 68 Ill. 570; *Gridley v. Same*, 71 Ill. 200; *Holder v. Same*, 71 Ill. 106.

When salary is fixed, no extra compensation can be allowed for extra service. *Carr v. Chartier's Coal Co.*, 25 Pa. 337.

A resolution remunerating officers who have been elected

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to serve without compensation is merely voluntary and revocable. *Loan Ass'n v. Stonewetz*, 29 Pa. 534.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

On the 5th of October, 1891, permission was granted to appellant and others to organize a banking association under the act of June 16, 1887, amended by that of June 3, 1889, (Hurd's R. S., Chap. 16a,) by the name of Corn Belt Bank, at Bloomington, with a capital stock of \$100,000, designed to be increased to \$300,000, in shares of \$100. Appellant subscribed for nine hundred shares and ten others for ten each. At a meeting of the subscribers on the 27th, the number of directors was fixed at eleven, and each subscriber was elected a member of the board; and at a director's meeting immediately following, appellant was elected president. After several intervening meetings not necessary to be noticed, the board, on the 25th of November, adopted the following resolution:

"Whereas, John McNulta has been elected president of the Corn Belt Bank, and preliminary to his acceptance of said office and entering upon the duties of the same, it is necessary to fix and agree upon compensation for his services as such president, therefore, be it resolved, that it is understood and agreed that the compensation of John McNulta as such president shall be one hundred dollars per year; and as a further consideration for his acceptance thereof, an additional sum equal to two and one-half ( $2\frac{1}{2}$ ) per cent on all stock to be issued, payable at the time fixed for such issues, that is to say, at least one hundred thousand dollars par value of the said stock to be issued within one year after the opening of said bank for business, and another additional one hundred thousand dollars, making three hundred thousand dollars in all that is to be issued, including the first issue of one hundred thousand dollars, within two years from that date.

The said John McNulta, by his acceptance thereof, agrees to subscribe for, and take at par value all of such stock, in

lots of not more than fifty thousand dollars each, within any one period of thirty days after the preceding lot has been fully disposed of, paying therefor in cash, par value with his own funds, whenever the board of directors shall find responsible persons agreeing to purchase the same from him at such a price as may be fixed by the board, not less than 105, and interest at seven per cent from date of issue of such stock; and to sell the same to the persons and in the amounts designated by the board, with only the restrictions in the transfer in use at the time of commencement of business; for the purchase and sale of which stock said John McNulta is to also have interest at the rate of seven per cent per annum and exchange on New York on all sums so invested by him. The surplus arising from the sale of said stock by him to inure to the benefit of the bank and to be disposed of as the board of directors may see fit."

On December 2, 1891, the bank was formally opened at 10:30 o'clock A. M., after inspection by the auditor's deputy and delivering of his certificate and permit of that date, authorizing it to commence business. Half an hour later the directors held a meeting, at which, among other business done, the by-laws reported were adopted, and the salary and compensation of the president was fixed by re-adoption of the resolution above quoted—the record showing that the vote on the motion was taken by roll call, the vice-president presiding, and that all the members voted in favor thereof. Immediately upon its adjournment the same persons organized as a meeting of stockholders, and in that character by a unanimous vote, representing all the shares, approved the by-laws specifically and assumed generally to "approve and confirm all the records, proceedings and transactions of the board to date." On the same day appellant was credited on the books of the bank with \$102,500, of which \$100,000 was ostensibly for the price of the stock issued to him, and the \$2,500—as would seem from his deposit ticket for that amount, and a charge in the expense account book of the same amount and date, for "organization"—was the percentage on the amount of stock so issued, under said resolu-

tion. In May, 1892, the directors, against strong opposition by some and with general reluctance, issued to him an additional amount of \$50,000 in stock, on which he received \$1,250 as percentage under the same resolution. But afterward refusing to issue any more, he resigned his presidency at the close of the year's service on December 2, 1892, and on January 25, 1894—the "two years after the opening of the bank for business" having elapsed—brought this suit in assumpsit on the common counts and two special counts upon the resolution quoted, to recover \$3,750 damages for the non-payment of the 2½ per cent on the further amount of stock originally intended to be, but which was not, issued.

Defendant pleaded the general issue, *non est factum*, and set-off of \$3,750, the percentage alleged to have been unlawfully received by plaintiff on the amount of stock that was issued.

A jury having been waived and the cause tried by the court, the issues were found for the defendant on the first and second plea, and against it on the last. A motion for a new trial was overruled and judgment entered for the defendant for its costs; from which plaintiff took this appeal and assigns error upon divers rulings of the court and the entry of said judgment. Defendant assigns a cross-error upon the finding on the plea of set-off.

In the argument for appellant it is said that "the only question involved in this record is, had this corporation (the power) either by its directors in the preliminary organization, or by its directors in the completed organization, or by its stockholders after the corporation had been duly chartered, to pass the resolution in controversy."

It is declared upon as embodying an absolute contract between the corporation and the appellant, its president, by which for the consideration therein mentioned, he was to receive besides the annual salary the further sum of \$5,000, "one-half of which should be payable in any event within one year and the other half within two years, and all of which might upon a contingency be payable within the first year," which contingency was the time to be fixed

for the issues of additional stock. And the breach alleged in the special counts is not that the defendant failed to issue the stock, but that it failed to pay the money.

In support of appellant's claim three propositions are urged: First, of fact, that the provision bound appellee to pay it whether the stock should or should not be issued; second, of law, that the directors, or if not, the stockholders, had power so to bind it; and third, of equity, that if the alleged agreement was in that respect *ultra vires*, yet if it had been in good faith fully executed on the part of appellant, appellee can not set up that defense.

The first involves and depends upon the construction of the resolution. In his testimony appellant says he frequently stated to members of the board, when asked if by the resolution they were bound to issue additional stock, "that it was in the power of the board to stop the issue of stock at any time; that it required a vote of a majority of the board to increase the stock, and without that vote it couldn't be increased. Upon the question about commission, or not paying commission, I simply told them what the resolution said." This is further shown from the following extract from the argument: "The sole purpose, intent and meaning of the reference to the issue of stock \* \* \* is to fix a time for the payment of this portion of the compensation agreed on. It made the amount named due and payable at any time upon the issuing of the stock. It made the same payable in any event at the expiration of the time named within which it was intended the stock would be issued, and contingent only upon the refusal of appellant to carry out the obligation imposed upon him. The purpose to issue \$300,000 in capital stock was a purpose only, subject, of course, to a change of intention on the part of the directors and stockholders as good business judgment might require. The power to issue or increase the stock was absolutely and wholly in the control, first, of the board of directors; second, of the stockholders; and there was no binding obligation upon either to issue such additional stock; and therefore when appellant accepted the office of president, and pre-



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pared himself to comply with the terms of the resolution, his compensation was not left to any future action which might result in a change of policy, but was made absolute in the beginning."

From these passages we understand the view of appellant and his counsel to be that the resolution did not bind appellee to issue any additional stock, but did bind it to leave the question to the discretion of the directors; that while it expressed a purpose to issue the additional \$200,000 it was not an obligation, but only a purpose which the directors could change or refuse to execute, as good business judgment might require, without thereby violating any contract with or doing any legal wrong to appellant; but that if they should so refuse, and he should be ready and willing to take, pay for, and sell it as therein expressed, appellee would be bound to pay him the amount of percentage stated. And the claim is that the compensation sued for, being for services not included in the usual duties of president, but yet in the interest of the corporation and legitimate in their character, and having been fixed before they were performed or undertaken, is properly recoverable in this action upon the authority of *Ellis v. Ward*, 137 Ill. 509; and so notwithstanding his official relation to the board of directors. *Beach v. Miller*, 130 Id. 169 and citations.

These passages present all that is said for the construction which excepts from the obligatory provisions of the resolution only the matter of the actual issue of additional stock, and the reason for that exception is based, not upon the language of the instrument or any want of power in the directors or stockholders so to bind the corporation, but is inferred solely from the character of the subject-matter, which involved a course of future action materially affecting its interests, and which could not be properly determined in advance, but only in view of the business conditions existing or apparently existing when such action should be proposed. This would be a good reason for doubting the intention so to bind it, unless it was otherwise satis-

factorily shown; but if they had power to do it and clearly expressed their intention thereby to do it, it was for them to take the chances of future condition if they would, and their agreement in that behalf, however injudicious, would be binding.

We find nothing in the language of the instrument which clearly compels the construction contended for. Nor do we mean to express the opinion that it clearly imports a positive agreement to issue the additional stock in consideration of his agreement to purchase and pay for and sell it as therein set forth, though we incline to think that would be the better opinion from the face of the resolution. For whatever is stated as contemplated in any sense or case to be done, is stated as being positively "understood and agreed" should be done. These terms seem to apply alike, in obligatory force, to every act that is in any way referred to, though with different qualifications as to time of performance, and therefore that the issue of the stock and the finding of responsible persons agreeing to purchase it of appellant at the premium indicated were as clearly matter of positive agreement as that he should receive two and one-half per cent on the amount thereof.

Nevertheless, for other and weightier reasons besides the one suggested, we concur in the conclusion that it established no binding obligation upon appellee to issue the stock; and hold, further, that it was not thereby bound to pay or allow to appellant a percentage on any amount that was not issued, whatever may have been the intention of the directors in adopting and re-adopting the resolution, or of the stockholders in approving and confirming it. Circumstances outside of it, which may properly be considered in arriving at its construction, strongly tend to show that excepting the provision fixing the salary it was wholly and merely conditional; that the intention was only to declare the policy and purpose then entertained, though contingent upon future and uncertain conditions, and to indicate the means by which, as then understood, it could be executed, if and when these conditions, in the judgment of those then

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having the power, should warrant it. Some of these circumstances are, the time of its adoption, the relation of those who joined in it to each other and to the corporation, the essentially conditional character of the purpose, the time for its execution, the form of the instrument by which it was expressed, and the acts and declarations of those who adopted and confirmed it, showing their understanding of it and their actual knowledge of the statute requiring them to submit every proposition for an increase of the stock to the vote of those holding the outstanding shares.

It was adopted before, and re-adopted and confirmed immediately after the bank was opened for business, exclusively by the persons who constituted the board of directors. They had been elected to serve for the term of one year, but their programme contemplated a period of two years, and certainly included four separate and distinct issues of additional stock, and the payment to one of their members of large sums of money for services to be rendered by him in connection therewith. It was in the form of a resolution—a form which may embody an absolute contract between proper parties, but usually implies a reserved right of repeal or modification by a majority of those who adopted it or of their successors, and in which, as merely declaratory of a policy to be conditionally pursued, he might properly join, as he did, but as embodying an absolute contract with himself as an individual he could not. They were all to be trustees of the existing body of stockholders, however composed, which was liable to be changed in its composition from day to day, and to which alone the power to determine the question of increasing the stock was by law committed. The resolution itself expressly anticipates such a change at an early day as might give to the new members of that body absolute control in that respect; and the fact was that before the issue of the additional \$50,000 was definitely proposed, a majority of the original stock had been sold and transferred to and was held by parties who had no voice in the adoption of the resolution. Of the 990 shares for which appellant subscribed he retained only fifty, and less than

440 were held by those who assumed to confirm it. These same directors did submit that proposition to a meeting of those then holding the original stock, especially called by them for that purpose pursuant to the statute. At the same meetings at which as directors and stockholders, respectively, they re-adopted and confirmed the resolution in question, they so also adopted and confirmed a by-law, to be further noticed hereafter, by which they undertook to secure the vote of all stockholders in favor of all propositions that should be submitted by the directors for the increase of the capital stock as set forth in the resolution; and it was, doubtless, in view of this by-law that appellant gave the opinion he did that the resolution did not make the issue of additional stock obligatory, but that it was in the discretion of the directors. It also appears that some who would otherwise have opposed the proposition to issue the \$50,000 in May, 1892, were constrained to vote for it under the impression that the by-law was operative and compulsory.

These facts *dehors* the resolution strongly tend to show, if they do not conclusively show, that the purpose to increase the stock, and, consequently, the plan for its execution, as therein set forth, were understood by all the parties to it, whether as directors or stockholders, to be conditional and subject to the formal approval of the stockholders in the manner prescribed by the statute.

But if this view of the resolution—which would eliminate the question of *ultra vires*—is not clearly tenable, we hold that the persons had no power, in either of their capacities, to bind appellee, or authorize the directors, in their discretion, to increase the capital stock by several distinct issues.

Whether, when, and in what amount such increase shall be made, are questions of policy, to be determined, not by the directors but by the stockholders. This is "fundamental in the law of corporation." *Wheeler v. Pullman I. & S. Co.*, 143 Ill. 197; *Eidman v. Bowman*, 58 Ill. 444. The statute also gives that power to them exclusively, and expressly prescribes the manner in which it is to be exercised. Sec. 12. Appellee, like all other bodies having only a statu-

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tory existence, can exercise its franchises and powers only in the manner provided by the law under which it is organized, and where one mode is so prescribed any attempt to exercise them in any other is impliedly forbidden. *Fridley v. Bowen*, 87 Ill. 151.

The section referred to declares that "Whenever the directors may desire to increase the capital stock, they may call a special meeting of the stockholders for the purpose of submitting to a vote of such stockholders the question of such increase. Such special meeting shall be called by delivering personally, or by depositing in the post office at least three days before the time fixed for such meeting, a notice properly addressed to each stockholder, signed by a majority of said directors, stating the time, place and object. At any such meeting, stockholders may vote in person or by proxy, each stockholder being entitled to one vote for each share of stock held by him, and votes representing two-thirds of all the stock of the corporation shall be necessary for the adoption of the proposed change of amount of capital stock. At any regular meeting, or at the time and place specified in said notice, said proposition may be submitted to a vote." (We have omitted from this quotation only what is superfluous or irrelevant here.) The section further requires that when the vote is sufficient to carry the proposition a verified certificate thereof shall be filed in the office of the auditor and of the recorder of deeds of the county where the principal business office of the corporation is located, and declares that upon such filing the change in the amount of stock so proposed and voted for shall be and is declared "accomplished in accordance with the said vote of the stockholders." The corporation is then required to cause to be published in some newspaper in or nearest the county in which their principal office is located, a notice of such change for three successive weeks.

The statute contemplates no other manner or means of increasing the capital stock. That can, therefore, be done only in the one way prescribed — by a vote of the stockholders' meeting, and certificate thereof duly verified and filed.

These proceedings do immediately "accomplish" the object, leaving nothing further to be done to that end. It is thereby "accomplished" in accordance with the vote—which is the expression of the independent and deliberate judgment and will—of the stockholders. They, and they only, can lawfully vote upon the proposition. They may do so in person or by proxy, or they may decline to vote, but unless there is an actual and affirmative vote of those representing two-thirds of all the stock the proposition is defeated. It is their absolute right to defeat it either by voting or declining to vote. The power of the directors in relation to it is limited to their duty, which is, to "submit" it to the vote of the stockholders, and to submit is "to leave or commit to the discretion or judgment of another or others." (Webster's Dictionary.)

We are also of the opinion that the proposition intended by the statute is one for a single and definite increase, which may be properly acted upon in view of present apparent conditions, as in the judgment of present stockholders it would affect their interest. They can not, by one vote, decide upon an increase of an aggregate amount in unfixed parcels at unfixed time, distributed and running through a future of two years, without regard to the judgment or will of those who in the meantime become stockholders.

As a recognition by appellant and his co-directors of the absolute right of the stockholders, by statute, to vote upon each proposed increase of the stock and defeat it if they should see fit, we have already adverted to the facts that the issue of the \$50,000 additional stock was voted for at a special meeting of stockholders called for February 5, 1892, and that they attempted to secure a like approval of every such proposition they should submit, under the limitation of the resolution, by a by-law which was as follows (Art. 6, Sec. 4):

"That all of the stock of this bank sold or transferred shall be with the express condition and understanding that it will be voted in favor of all propositions submitted by the board of directors to increase the capital stock

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of this bank from time to time, not exceeding \$50,000 at any one time, or within a period of sixty days, until its capital stock reaches \$300,000; and that the new stock be disposed of entirely to persons, and in such amounts, as the board of directors may direct. That the provisions of this article and the by-laws of this corporation shall become a part of every contract for the transfer of any stock of this bank, and shall operate as a reservation of a limited ownership of the stock transferred to the extent of the provisions hereof made binding on the transferee by the acceptance thereof."

If this section were valid it would add nothing to the strength of appellant's case, because the directors never did submit a proposition for the future increase of the capital stock.

But we hold it to be void. By section four of the statute the directors are authorized "to make by-laws (not inconsistent with this act) for the government of the association"—that is, to prescribe the means and mode of exercising the powers and franchises conferred upon it—but neither they nor the stockholders have any power, by agreement or otherwise, to change in any respect or particular the organic law of the body. By that law the stockholders are the constituent members of that body. They own the capital stock and all other corporate property. They dictate and control the policy according to which it is used and administered. They elect the directors, who are their agents and trustees for such use and administration. Each has an absolute right to cast a free and independent vote for every share he holds, upon every proposition to increase the stock, and to transfer such shares, with all the powers and privileges annexed by the statute to the ownership, without any condition, limitation or qualification except as to the mode of doing it. These are organic features of every banking association that can be organized under the statute. They give value to the shares, and security for the protection of all the interests that may become involved, which they would not otherwise have.

This by-law, if valid, would set up a banking corporation of a very different character. Its fundamental vice is in the provision for limiting the transferability of the stock, by imposing conditions which would impair its value and weaken public confidence in the corporation, by disfranchising the holders and giving the directors power to increase it and so to place the increase as to secure their own re-election. The right of the holder to transfer his shares without condition or limitation is deemed of vital importance. All unreasonable attempts to restrain it are void as against public policy; and although an agreement between the members, or a part of them, not to sell except on certain conditions, may be valid if it does not amount to an unreasonable restraint of trade, their right "can not be restrained by a by-law of the corporation." Cook on Stock and Stockholders, Secs. 331-2 and notes.

Then the resolution here sued on is not aided by their by-law. And we hold that it in no way affects the statutory duties, rights or powers of the directors, stockholders or corporation. In respect to the issue of additional stock, it expressed only a present purpose, the execution of which was in fact and law necessarily contingent upon future conditions beyond the control of directors, stockholders or corporation, and of such purpose only on the part of the persons who expressed it. They had no authority, at that time or in that way, so to speak for the corporation. We know of no way in which it could speak on that subject except by proceedings in conformity with section twelve of the statute.

It is not pretended that this resolution was adopted or confirmed in conformity with the provisions of that section. If, then, those who so voted did not thereby bind the corporation to issue additional stock, as is conceded, nor had any power by any form of expression, so to bind it or even to declare its conditional purpose so to do, as we hold, they could not bind it to pay appellant for services in arranging for means by which it might or would be enabled to do so. Having been rendered, if they were performed, without re-



quest of the corporation, it would not be liable to pay for them except to the extent it accepted and availed itself of them, and to that extent he was fully paid before this suit was brought. As originator and promoter of the corporation, and by far the largest subscriber for its stock, he was doubtless confident that the policy and purpose indicated by the resolution of which he was the author would be carried out by the corporation, but he must be deemed to have taken the risk of its refusal and made his arrangements in view of that. Under the pressure of his influence, appellee did pursue and execute it as to the \$50,000 of additional stock issued and paid him for his services in connection therewith, but with reluctance, and full notice to him that it would go no farther in that direction. If the resolution was *ultra vires*, then so far as it remained unexecuted that defense is valid.

For these reasons, we are of opinion that he had no legal claim to further compensation, and that the issues on the first and second pleas were rightfully found against him.

Of the counter-claim, under the plea of set-off, for \$3,750, alleged to have been wrongfully received by him as percentage on the amount of stock that was issued, but little need be said.

It is not entirely clear that the resolution sued on contemplated the payment to him of any percentage on the amount of the original stock, and still less that he received any to his own use. He positively testified that he did not; that the credit to him on the books of \$2,500 was an error, and that it was expended by him for the bank, giving the items and showing the vouchers.

The \$50,000 additional stock, on which he did receive \$1,250 was regularly issued. Whether he did, or failed to do, what would entitle him to payment according to the terms of the resolution, would be an unpleasant question to consider upon the evidence, and we feel relieved of the necessity of considering it, by the fact that the directors, treating what he did as a compliance on his part, actually paid him, and the corporation, so far as it could, acquiesced.

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If there was a mistake of the law on either side there was no misunderstanding of the facts, and if there was any wrong or fault upon the facts it is chargeable alike and equally to both.

We are therefore of the opinion that the issue on the plea of set-off was also rightfully found, and the judgment will be affirmed.

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**John Roche v. Anna L. Norfleet.**

1. **RESCISSION OF CONTRACTS.**—*Placing a Party in Statu Quo.*—In exercising the right to rescind a contract of sale it is sufficient, where the buyer has given his worthless notes for the price, that the seller in his suit brought to disaffirm the sale, leaves the court to return the notes and place the buyer in *statu quo*.

2. **SAME**—*Willful Concealment—Discovery of the Fraud.*—When once it is established that there has been a fraudulent representation, or a willful concealment, by which a party has been induced to enter into a contract, it is in general no answer to his claim to be relieved from such contract, to say that he might have discovered the truth by proper inquiry.

3. **SAME**—*Affirmance Through Ignorance.*—If the contract is affirmed while the party is ignorant of the fact which would authorize a rescission he will not be prevented from afterward rescinding.

4. **APPELLATE COURT PRACTICE**—*Objections to Equity Jurisdiction Must be Raised in the Court Below.*—The objection to the jurisdiction of a court of equity on the ground that there is a remedy at law can not be urged for the first time in a court of review.

5. **EQUITY PRACTICE**—*Rescission of Contracts.*—When a transaction including a conveyance of land is rescinded for fraud, the whole transaction is null and void, and in contemplation of law, there has been no delivery of the deed. It is not necessary to require a reconveyance of the land; a return of the deed is sufficient.

6. **APPELLATE COURT**—*Amendment of a Decree.*—The Appellate Court in this case amends the decree instead of remanding the case for that purpose.

**Bill to Rescind a Contract.**—Error to the Circuit Court of Moultrie County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the May term, 1895. Affirmed. Opinion filed December 6, 1895.

W. G. COCHRAN and R. M. PEADRO, attorneys for plaintiff in error.

FRANK M. SHERIDAN, HARBAUGH & WHITAKER and I. R. MILLS, attorneys for defendant in error.

OPINION PER CURIAM.

This was a bill in chancery to set aside and cancel a certain contract entered into by and between the parties, whereby the defendant obtained possession of a stock of goods from the complainant. By the terms of the contract the defendant was to convey certain lands in Garfield county, Kansas, valued at \$4,500, to the complainant—pay to a creditor of complainant the sum of \$203.48 and execute notes for \$1,300, with satisfactory security, in payment for the goods.

The conveyance of the land was made, the notes were executed, and to secure the same a mortgage was also executed upon a certain house and lot in the town of Randolph, Riley county, Kansas, and then the goods were delivered to the defendant.

The ground of rescission alleged in the bill was the fraud of defendant in misrepresenting the value of the lands so conveyed, and the condition of the title thereto, as well as that of the property in Randolph.

The decree was according to the prayer of the bill. The defendant has brought the case here by writ of error.

The abstract of the record as furnished by the plaintiff in error has been found very incomplete, and in order to obtain a fair view of the case, we have been compelled to examine the testimony as reported by the master in chancery. That report is unnecessarily tedious, and is incumbered by much extraneous matter, consisting of protracted and unseemly controversies between counsel during the taking of the testimony, and by a prolix and tiresome method in the examination and cross-examination of witnesses. We would have been entirely justified in affirming the decree for the want of a proper abstract, but have not done so and have carefully read the evidence as it appears in the record.

It is not necessary to state in detail, or even in a general

way, the substance of the proofs. We shall merely present the conclusion reached in that respect, which is that we thoroughly agree with the trial court that the allegations of fraud and deceit alleged in the bill are established by the preponderance of the evidence.

The land conveyed was practically of no value whatever. It did not answer the description given as to its topography, its fertility, its improvements, the crops then there, or that year produced, or its location with respect to the county seat.

A more glaring fraud could not well be imagined. There is no possible room to say that the difference between the facts as represented and as they were, might be ascribed to the ordinary exaggerations which may be expected. Moreover, the land, worthless as it was, had an incumbrance upon it in the shape of a mortgage for \$1,000 to one William Coulter, Jr., who had recently died. In order to make clear the abstract of title, the defendant (plaintiff in error) caused one George Coulter to appear before an officer authorized to take acknowledgments and personate the deceased mortgagee, William Coulter, Jr., and acknowledge in his name a release of this mortgage. Thus crime was added to fraud. The mortgage given to secure the deferred cash payments was of no value because the property in Randolph thereby affected was worth less than the indebtedness and was already incumbered for its full value or more, contrary to the express representations of the defendant. It is argued in his behalf that the goods were not worth \$6,000, and that the complainant was also guilty of substantial misrepresentation. The evidence is conflicting as to this point, but it is not to be denied that the defendant inspected the goods with all desired care and knew what he was getting. Nothing was concealed from him, nor was there any effort to mislead him. If the value of the goods was over-estimated, there is no proof to show that there was any intentional or fraudulent over-statement. With a fair opportunity for inspection, the defendant was satisfied to take them at the agreed price. It is very clear that whatever the fair value was he, would realize a considerable sum if he could get

possession and convert the stock into money, as no doubt he intended to do, without paying the two \$500 notes.

He could well afford to pay the first note and also the sum assumed to the creditor, and as the land was worthless, as was the security for the two \$500 notes, and as he was insolvent, the complainant would realize not more than about \$500 for the goods. It is reasonably clear the scheme was designedly fraudulent and therefore the complainant had a perfect right to obtain a complete rescission of the whole transaction.

It is urged, however, that the complainant could not, and that the decree does not, put the defendant in *statu quo*.

We think the proof shows that defendant, while he was in possession of the goods realized from sales more than he put in either by way of payments under the contract or by way of new goods added to the stock. Of the \$203.48, which he was to pay to complainant's creditor, he paid but \$100, and his note, which he gave for the residue, was returned to him by the creditor.

As to an item of \$175, which he claims as a payment on the note last maturing, we think the proof shows that the order for that sum drawn upon him by the complainant and which he accepted was not in fact paid either by cash or by new notes as he insists it was, but that it was taken up by the complainant from the drawee by paying the amount thereof and was presented to the master for cancellation.

A suggestion found in the brief, that the case was not one for a court of equity because there was a remedy at law, may be answered by reference to the well settled rule that such an objection can not be urged for the first time in a court of review; but if the point were before us it would suffice to say that fraud is a substantial head of jurisdiction in equity and that there were circumstances and features of the case which fairly invoked the aid of a court of chancery.

It is urged that complainant after a full knowledge of the fraud elected to abide by the transaction and thereby waived the right to rescind. This is based upon her supposed action in regard to the two \$500 notes which she assigned to a bank. Just when this was done, with reference to the time

when she learned fully as to the fraud, does not very clearly appear. We may fairly presume that the notes were placed in bank as collateral, or perhaps were discounted before the discovery of the fraud. It may be that one of the notes was protested for non-payment after the bill was filed, but it does not appear this was done at the instance of the complainant. On the contrary, from the indorsements we might well infer it was at the instance of the bank.

However this may be the complainant was responsible to the bank in respect to the paper and was compelled to take it up, and it appears that was done, for the note was by the complainant presented to the master for cancellation.

We think there was nothing in this to bar the relief sought by the bill.

It is also urged that the decree is defective in not requiring the complainant to reconvey the land and release the mortgage, and authorities are cited to show that merely returning a deed after delivery does not revest the title in the grantor.

The answer is, that because of fraud the whole transaction was to be deemed null and void.

Hence there was in contemplation of law no delivery or acceptance of either the deed or the mortgage, and it was sufficient to, return the same to the grantor. It does not appear and is not claimed that these documents were placed on record by the complainant, and therefore it is not necessary that she should in any wise be connected with the record of the title. It is also urged that the decree is too vague and indefinite in describing what papers should be returned by complainant to defendant for cancellation. That portion of the decree is as follows :

“ But before said goods shall be delivered to complainant, she, or the master in chancery, shall turn over to the possession of defendant, for cancellation, all of said papers that she has received, and now has, from the defendant, during or under said sale or transfer.”

It would seem from the proof that the deed, the mortgage, the two \$500 notes, and the order for \$175, and exhibit II (which was a written statement as to the character of

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the land), were all the papers which were received by the complainant from the defendant, and that these were all placed in the hands of the master during the taking of the proofs, so that the words "and now has," referring to the complainant, were inapt and might well have been omitted. It is also true that a more specific statement of the papers to be returned would have been better. But if it should be held that there are substantial defects in the form of the decree, it seems quite clear that under our statute of amendments and jeofails the trouble may be obviated by amendment. The decree ought not to be reversed on that account. Had the attention of the court been called to the matter, the necessary correction would no doubt have been made below, and it may be made here.

Accordingly the decree will be amended here so as to provide that the master in chancery, having received from the complainant the said deed and the said mortgage and the said two promissory notes, being the deed, mortgage and notes specified in the bill, and the order for \$175 drawn by the complainant per J. K. Norfleet upon defendant, dated October 11, 1893, being the order referred to in the proofs taken by said master, shall by the said master be marked canceled and returned to the defendant, as a condition of the return of said stock of goods to the complainant, and that if the defendant shall decline to receive said papers, the same being so canceled, shall be filed with the clerk of said Circuit Court, subject to the order of said defendant, and the decree so amended will be confirmed at the cost of the plaintiff in error. Affirmed.

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**William R. Patton et al. v. The People ex rel. Henry A. Neal.**

1. CITY COUNCIL—*Canvass of the Returns of an Election.*—In canvassing the returns of an election the city council do not act as judges of the election and qualification of its own members, but as canvassers of the returns of the election of incoming city officers in pursuance of

the duty imposed by Sec. 10 of Art. 4, Ch. 24, R. S., which is to examine and canvass the returns and declare the result, and cause a statement thereof to be entered upon its journal.

2. *SAME—Duty in Canvassing Returns, Ministerial.*—The duty of a city council in canvassing the returns of an election is purely ministerial; it determines nothing judicially. It may probably judge as to whether the returns are in due form, but such action is not judicial, and after that, it can only compute the votes cast for the several candidates and declare the result.

3. *SAME—Its Action may be Controlled by Mandamus.*—It is the duty of a city council, when acting as a canvassing board, to solve for itself correctly all questions as to the form of the returns, both as to the fact and the law, as a part of its ministerial duty, and this duty it may be compelled to perform by mandamus.

4. *ELECTIONS—Canvass of the Returns.*—In arriving at the result of an election, the canvassing board is not to consider the judges' certificate alone, or any other constituent of the returns, as a controlling force, but all are to be considered, and the result is to be found from a consideration of all which alike and together constitute the returns to be canvassed.

5. *SAME—Failure of the Council to Canvass the Returns—The Remedy.*—Where the returns of an election have not been canvassed and the result declared, as intended by the statute, mandamus is the appropriate remedy.

*Mandamus.*—To compel a city council to canvass the returns of an election. Appeal from the Circuit Court of Coles County; the Hon. FRANCIS M. WRIGHT, Judge, presiding. Heard in this court at the May term, 1895. Affirmed. Opinion filed December 21, 1895.

A. J. FRYOR, JAMES W. CRAIG and CHAS. C. LEE, attorneys for appellants, contended that as long as there is from the returns any room for reasonable doubt, mandamus will not lie.

Mandamus is an extraordinary remedy, the writ being one of the highest known to the law, and it only issues against a public officer or tribunal when the law imperatively enjoins the performance of a specified act or duty which the officer or tribunal refuses to perform. There is no proposition more firmly settled than that where official action depends upon the exercise of the judgment and discretion of the officer, courts can not interfere to dictate how the officer shall act, or what judgment he shall give. Board of Commissioners ex rel. City of Washington (Ind.),



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49 N. W. Rep. 686; High, Extr. Remedies, No. 42 *et passim*. As long as there is any room for reasonable doubt as to whether or not the matter depends upon the result of an inquiry or investigation into the facts, or which involves the hearing and consideration of evidence which is to control the action of the officer or tribunal, courts will not undertake to review the conclusion or judgment collaterally, in a mandamus proceeding, after the officer or body has acted. Holliday v. Henderson, 67 Ind. 103; People v. Common Council, 78 N. Y. 33; Board of Commissioners of Hamilton County v. State, 113 Ind. 179; 15 N. E. Rep. 258.

F. K. DUNN, attorney for appellees.

The duties of the city council as a canvassing board are purely ministerial. The People v. Hilliard, 29 Ill. 413; Lewis v. Coms. Marshall Co., 16 Kan. 102; 22 Am. Rep. 275; The People v. Head, 25 Ill. 325; The People v. Kildeuff, 15 Ill. 492; Elisha Strong, Petitioner, 20 Pick. 484.

Mandamus will lie to compel a true canvass of the returns, even though a certificate has been issued to another, who has been commissioned, and the canvassing board has adjourned. The People v. Rives, 27 Ill. 242; The People v. Nordheim, 99 Ill. 553; The People v. Hilliard, 29 Ill. 413; The People v. Matteson, 17 Ill. 167; State of Florida v. Gibbs, 7 Am. Rep. 233; 4 Wait's Actions and Defenses, 368.

Even a discretionary power, if exercised with manifest injustice, will be controlled by mandamus. Dental Examiners v. The People, 123 Ill. 227; Village of Glencoe v. The People, 78 Ill. 382; Zanone v. Mound City, 103 Ill. 552; Stephens v. The People, 89 Ill. 337.

The mere ascertaining of the amount obtained by the multiplication, addition or subtraction of given numbers, presents no question of fact. People v. Supervisors, 125 Ill. 9.

MR. PRESIDING JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

At the regular city election in the city of Charleston on

the third Tuesday of April, 1895, William R. Highland and Henry A. Neal were candidates for the office of mayor. The city was divided into four wards. Appellants, who composed the city council, at a meeting held as provided by ordinance for the purpose of canvassing the returns, referred the matter to a committee of three of their number, of whom a majority found and reported the result as to that office to be that Highland received 628 votes and Neal 625. A motion being thereupon made and seconded that the report be received and the candidates as named be declared elected, an amendment was offered to receive it on all except Highland, who was defeated by a tie vote—the mayor, Patton, not voting—and the original motion was then adopted by a vote of four to three, one of the aldermen who had voted for the amendment not voting. A motion then made, that the candidates respectively reported as having received a majority of the votes be declared elected, was carried unanimously as to each except Highland for mayor, and as to him by a vote of four to three. These proceedings appear more fully in the journal of the city council.

The only question in the case arises upon the returns of the election in the second ward. As to them the evidence is that the poll books, tally list and judges' certificate—which are the constituents of the returns (*The People, etc., ex rel. v. Ruyle*, 91 Ill. 528) seem not to agree. The list of voters in the poll book numbers 347; the certificate of the judges, attested by the clerks of the election, is that "W. R. Highland received 188 votes for mayor," and "H. A. Neal received 158 votes for mayor," making only 346 in all; the tally list shows 193 lines opposite the name of Highland and 158 opposite that of Neal (making 351) and yet the footing of the tallies for Highland are carried out as 188, being five less than actually and certainly appear.

The number of lines shown being taken to be the number of votes cast for Highland would give him a majority of three, while the number as carried out, which is also the number certified by the judges, would give Neal a majority of two.

Appellants having adopted these lines as showing the number of votes cast in the second ward for Highland and declared the result accordingly, the relator filed the petition herein for mandamus commanding them "forthwith to examine and canvass the returns of said election for mayor, and, as a part of such canvass, to include therein the returns from said second ward as certified by said judges and clerks of election, showing 188 votes cast for William R. Highland, and 158 votes cast for your petitioner." Several pleas were filed and issues joined, but all of the facts in the case and all the evidence are above sufficiently set forth; upon which the court, refusing all the instructions asked on behalf of appellants, directed the jury to find the issues for the plaintiff, and upon such finding, overruled a motion to set it aside, and rendered judgment awarding the writ of mandamus as prayed for and for costs. To these rulings and this judgment, exceptions were duly taken, and this appeal was prayed and allowed.

The petition, verified by affidavit of the relator, alleged, among other things, that he was present with his counsel at the meeting of appellants held to canvass the returns, and then and there insisted that they should canvass the returns from the second ward as certified to, and declare the result accordingly; which allegation was not in any way denied. Besides the city clerk, who identified all the records offered in evidence, the only witness examined or offered on either side was the petitioner, who testified only to facts showing his eligibility to the office for which he was a candidate at the election in question.

In their proceedings in the premises the city council were not acting as judges of the election or qualification of their own members, but as canvassers of the returns of the election of incoming city officers, in pursuance of the duty imposed by Sec. 10, Art. 4, Ch. 24 of R. S. (Hurd's Ed. of 1893, p. 254), which was to "examine and canvass the returns, and declare the result of the election, and cause a statement thereof to be entered upon its journals."

The duty thus imposed is purely ministerial. The Peo-

ple ex rel. v. Head, 25 Ill. 325; Same v. Hilliard, 29 Id. 420. They determine nothing judicially. Their duty, and their whole duty, is prescribed by the statute, and that they are to do. It is "a mere mechanical, or, rather, mathematical duty. They may probably judge whether the returns are in due form, but after that they can only compute the votes cast for the several candidates and declare the result," said the court in the Head case. And in *The People ex rel. v. Nordheim*, 99 Ill. 561, it was said that "the canvassing board, from the very nature of the transaction, must in every case determine for itself whether the papers transmitted to it are, within the meaning of the law, returns of an election. The canvassers must be satisfied that they are genuine, and that they purport on their face to give the result of the election." The board determines these questions "for itself," that is, ministerially; not judicially, that is, for the parties in interest. This sort of judgment is not judicial or discretionary. Nor is it peculiar to these ministerial officers. The unavoidable necessity for such judgment arises in the performance of almost every duty, which is, nevertheless, regarded as purely ministerial. The sheriff's duty, imposed by his writ, is to serve it upon A B, or levy upon his property. There may be a question about his identity or that of the property upon which the officer levies. He must decide it, but if he mistakes the fact, or the law which determines the fact, however honestly, he fails to perform the act required of him; and so in almost every such case. These election returns come from different officers in different election districts. Some one body must be appointed to canvass them all and declare the result of the whole. Very doubtful and difficult questions may arise in the attempt to ascertain whether they are in proper form or just what they purport to give as the result of the election. But however difficult, it is a part of the ministerial duty of the canvassing board to solve them for itself. But they must solve them correctly, both as to the fact and the law, or they do not perform the ministerial act which the law commands, and their action may be controlled by mandamus.

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Here the doubt is, which is correct as to the number of votes cast for Highland in the second ward—that shown by the tally list or that shown by the certificate of the judges? These differ. Both can not be correct. Neither tends to explain the other or to show how the difference occurred. Neither is, in itself, at all uncertain. The carrying out or footing of the tally list does not make it uncertain, as it appears of itself, but is itself plainly an error. The record shows 193 lines, in squares of five each, excepting the last, which contains only three. They may have been counted by squares; and these appearing alike and being consecutively adjacent, one may have been inadvertently overlooked; or, possibly, one may have been filled by mistake or fraud, after the count was correctly made and the footing set down. But how this was is matter of mere surmise. There is neither proof nor presumption as to how the difference between the tally list and the judge's certificate occurred. Having occurred and plainly appearing, the canvassing board was to determine ministerially which should be accepted as correct. It is to be regretted that they did not call in the judges and afford them an opportunity for explanations and correction, if they were prepared to make them, before the result was declared, as was suggested in some of the cases cited.

Which, then, if either, is the better evidence of the number of votes cast for Highland?

The writer is inclined to the opinion that the law, in case of irreconcilable difference between the certificate of the judges and either or both of the other "constituents" of the returns, must intend which is to govern the canvassing board. Otherwise it must give them some judicial power of determination, which is not claimed; or if claimed, is not warranted by the decision of the Supreme Court already referred to. He holds that in such cases the judges' certificate controls. That is what authenticates the other constituents, and they do not authenticate it; that where it is in proper form and without any uncertainty on its face, as it here appears, he apprehends it must control, though where

it is informal or its import is uncertain, it may be aided or explained by either or both of the others, which are inferior in character, and of force for that purpose only.

A majority of the court, however, are unwilling to go so far; they deny to either constituent a controlling force, holding that all are to be considered and the result to be found from a consideration of all, which alike and together constitute the returns to be canvassed. They agree that in this case the poll books contradict the tally list and aid the certificate. If there were only 347 votes, as the poll books show, there could not have been 351 votes legally cast, as shown by the tally list, but there might have been 346, as shown by the footing and judges' certificate. The tally list, therefore, was probably incorrect, and consequently also the declaration of the result of the election based upon it.

Then the returns in this case have not been canvassed and the result declared, as intended by the statute, according to either view of it, and mandamus is the appropriate remedy. *Ruyle v. The People*, 91 Ill. 525, and cases cited, *supra*.

The judgment of the Circuit Court will therefore be affirmed.

### Proctor Taylor et al. v. Henry Felsing.

1. MASTER AND SERVANT—*Duty as to Machinery*.—The law requires the master to use reasonable diligence to provide safe machinery for the use of a servant and to exercise a like degree of diligence in keeping it so.

2. PLEADING—*Omission of Legal Duty*.—It is sufficient to allege facts which disclose an omission of a legal duty. It is not essential that the omission should be expressly denounced as negligence.

3. NEGLIGENCE—*Continuing in Dangerous Service on Promises*.—A servant may continue in the employment a reasonable time to permit the performance of a promise to remedy defects in the machinery or appliances without being guilty of negligence, the risk being assumed by the master, who is responsible for any injury that may occur by reason of a failure to comply with his promise and his legal duty, unless the danger of continuing is so imminent that no one not utterly reckless of his safety would attempt it.

## Taylor v. Felsing.

**Trespass on the Case, for personal injuries.** Appeal from the Circuit Court of Adams County; the Hon. OSCAR P. BONNEY, Judge, presiding. Heard in this court at the May term, 1895. Affirmed. Opinion filed December 8, 1895.

*Special findings held not inconsistent:*

(2.) Was it not dangerous for a person to climb up or down said space or passage where the plaintiff was injured while said gearing of cog wheels was in motion? A. Yes.

(3.) Do you find from the evidence that it was hazardous and dangerous for said Henry Felsing to attempt to climb up or down said space or passage where he was injured, without stopping said gearing of cog wheels, or causing them to cease to revolve? A. No.

(5.) Do you find from the evidence that the plaintiff, at and before the time of his injury, knew that said gearing of cog wheels was uncovered and unguarded? A. Yes.

## STATEMENT OF THE CASE.

The action below was a case by the appellee to recover damages for the loss of his right hand and wrist while in the employ of the appellants.

The cause was submitted to the jury upon the second count in the declaration, the material allegations being appellant was operating a steam flouring mill, wherein he had certain machinery and appliances for receiving, cleaning and elevating wheat; that appellee was in his employ and charged with the duty of operating such machinery; that there was placed, kept and maintained on the main shaft which turned the gearing of certain cog wheels, a certain contrivance called a clutch pulley with a lever attached, by means of which said shaft and cog wheels could be and were thrown out of gear, and would and did cease to run or revolve, at the pleasure of the plaintiff, and thereby all danger to life or limb from said cog wheels could be and was averted.

\* \* \* And that the plaintiff was required by defendants, while so in their employment, to go and pass along the certain space or passage between said gearing of cog wheels and said wall of said basement, and to climb to and from said basement floor into and from said space or passageway, to and in order to clean and clear out said conduits, pipes, etc., when so clogged and choked as aforesaid; that when it

became necessary for plaintiff to clean and clear said conduits, pipes, etc., from clogging and choking, he could, by means of said clutch pulley, when it was on said main shaft, throw said shaft and gearing of cog wheels out of gear and stop them from revolving, and then climb up into said space or passage and clean and clear said conduits, pipes, etc., so that the wheat might freely pass through the same; that afterward and on, to wit, August 1, 1892, said clutch pulley was out of repair, so that it became necessary to remove the same, and it was then removed from said main shaft, temporarily, to the end that it might be properly repaired, and a stiff pulley was temporarily put on said main shaft in the place and stead of said clutch pulley, and until said clutch pulley should be repaired and replaced, and said stiff pulley was used by defendants in causing said shaft and gearing of cog wheels to run and revolve, and that by said stiff pulley said shaft and gearing of cog wheels could not be thrown out of gear and caused to cease to revolve; that the removal of said clutch pulley and the substitution for the same of said stiff pulley rendered the service of plaintiff in cleaning said conduits, pipes, etc., more hazardous than it had theretofore been; and thereupon plaintiff repeatedly and shortly before the injury, objected to defendants about the absence of said clutch pulley from said machinery, and the use of said stiff pulley in place thereof; and repeatedly, and shortly before said injury, requested defendants to have said clutch pulley replaced on said machinery and said stiff pulley removed; and defendants promised plaintiff to have said clutch pulley replaced on said machinery, and have said stiff pulley removed; and that plaintiff, relying on said promise, continued in his said service and in the performance of the duties thereof for a reasonable time, to permit the performance of said promises on the part of said defendants, etc. \* \* \*

And in describing just how the accident happened, it is further alleged: "And plaintiff then and there, while in the exercise of ordinary care for his own safety, climbed up into said space or passage between said gearing of cog wheels and said west wall of said basement, and then and there cleaned



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out and cleared out said conduits, pipes and spouts and freed the same from such clogging and checking, so that the wheat might freely pass through the same and said mill continue to be supplied with wheat, and thereupon, then and there, and while in the exercise of ordinary care for his own safety, necessarily attempted to climb down from said space or passage between said gearing of cog wheels and said wall of said basement, and while in the exercise of such ordinary care, his foot accidentally slipped, and he was thereby then and there thrown with his right arm in and upon, and his said right arm was then and there caught in said gearing of cog wheels, whereby plaintiff's right hand, wrist and arm up to within four inches of the elbow, was crushed and severed from his body, etc.

Defendants demurred to said amended second count, but their demurrer was overruled by the court.

Afterward the general issue was pleaded and a trial had before a jury.

The jury rendered a verdict in favor of the plaintiff and assessed his damages at \$2,600.

The defendants at the proper time requested the court to submit to the jury seven particular questions of fact, but the court only submitted three of them, and refused to submit the other four; and the jury when they rendered their general verdict, also returned into court their special findings on the questions so submitted to them.

The court overruled defendant's motion for judgment for defendants upon said special findings of the jury, notwithstanding the general verdict.

Motions by defendants for a new trial, and in arrest of judgment, were also overruled by the court, and defendants appealed to this court.

J. F. CARROTT, attorney for appellants.

GOVERT & PAPE, attorneys for appellee.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.  
A careful examination of the evidence has convinced us

the jury were warranted in finding the allegation of the declaration proven.

The objection the count does not charge appellants with negligence is without force.

The law required the master to exercise reasonable diligence, to provide safe machinery for the use of a servant and to exercise like degree of diligence to keep it safe.

The allegation of the declaration is, appellants removed the "clutch pulley" and thereby rendered the machinery unsafe and did not replace it within a reasonable time, though they repeatedly promised to do so.

It is sufficient to allege facts which disclose an omission of legal duty, and is not essential the omission be expressly denounced as negligence. 2 Thompson on Neg., 1246; *Zjednoczenie v. Sodeckie*, 41 Ill. App. 339.

It is urged it appeared from the evidence, appellee was aware of the danger which attended the execution of the work of cleaning the spout in the mode he adopted while the cog wheels were in motion; that he voluntarily undertook to perform the work and must be held to have assumed the danger, and that he did not act with ordinary prudence in going above the wheels while they were in motion, and for these reasons was precluded from recovering. The only way to open the spouts was to go above the cog wheels as the appellee did. The operation was attended with danger only when the cog wheels were in motion. But the master had removed the appliance devised and used for the purpose of stopping the wheels when such work was to be performed, and as the jury found, and as we read and accept the proof, had repeatedly promised appellee to replace it.

Appellee continued to perform the work in the usual manner under a reasonable expectation these promises would be complied with, and he enabled to control the motion of the wheels.

The rule in such cases is, a servant may continue in the employment a reasonable time to permit the performance of the promise without being guilty of negligence, the risk being assumed by the master, who is responsible for any injury that may occur by reason of his failure to comply with

his promise and his legal duty, unless the danger of continuing in the service and performing the task is so imminent no one not utterly reckless of his safety would attempt to perform it. *Anderson Pressed Brick Co. v. Sobkowiak*, 149 Ill. 573; *Missouri Furnace Co. v. Abend*, 107 Ill. 44.

The evidence brings the case at bar within this rule and the jury were expressly and correctly instructed with regard to it. They did not regard the probability of receiving injury, by continuing to do the work, so imminent or great as to justify the conclusion only a reckless person would attempt to perform it.

It is urged other means were provided whereby appellee could have stopped the cog wheels. First, by means of an appliance called the "friction clutch;" second, by using the belt tightener; third, by removing the belt with stick.

It however clearly appeared this clutch was not intended for the purpose and that its use would have stopped the movement of all the machinery used for scouring and cleaning the wheat for the space of near an hour.

It was frequently necessary to clean the spouts, in order that the grain could pass—often two or three times in one day.

The use of the "friction clutch" for the purpose in question, would have thus interfered with the delivery to the burrs of the requisite quantity of wheat, thus delaying the operation of the mill, and the jury were warranted in concluding, this would not have been permitted by appellants.

It was clear it was not appellants' intention or desire the "friction clutch" should be so used, and that it was not practicable to use it for that purpose. The evidence tended to show appellee would have been discharged had he insisted upon applying this "clutch" each time when it became necessary to go above the cog wheels to keep the spouts in order.

It appeared the "belt tightener" could not be operated by one man, and that no one was furnished to assist, nor was any one at hand in the basement to whom appellee could apply for such assistance, and further, it appeared if the belt was thrown from its place by the belt tightener or by a stick the aid of two or more men was required to replace it.

Altogether it was manifest it was impracticable to stop the cogwheels by means of the "belt tightener," or by throwing off the belt with a stick, and also that the master did not expect or intend such course should be pursued.

Moreover we can not say but the jury were warranted by the proof in concluding he would not have permitted such course to have been adopted.

The "clutch pulley" was especially contrived for that purpose, and the appellants no doubt intended to replace it in fulfillment of the promise but neglected to do so.

The appellee relying upon the promise continued to discharge his duty and was injured thereby.

The risk thereby incurred was not assumed by him as incident to his employment, but devolved upon the master because of his promise and the duty imposed upon him by law in the premises.

Authorities relied upon by appellant do not in our view assert a contrary doctrine, but only the well recognized general principle that obvious dangers which a servant voluntarily enters upon are impliedly assumed by the servant.

Instruction No. 4, given for appellee, may be in a measure open to the criticism it assumes the machinery was defective. That the "clutch pulley" was necessary to render the machinery reasonably safe was fully proven and not contested.

That it was removed and the machinery thereby to that extent not reasonably safe, was well established and not questioned. It is not error to assume as true a fact proven, and not denied, but admitted.

The argument the machinery in question was not defective, and therefore the instruction was erroneous, is hypercritical.

Practically, the machinery, lacking a clutch pulley, was defective.

The court gave nineteen instructions at request of appellant and refused eighteen others asked in the same behalf.

Those given advised the jury fully as to the law of the case, indeed were more favorable to the appellants than the facts of the case warranted.

The complaint as to the refused instructions is, the sixth, twelfth, and twenty-seventh ought have been given. We think not. The rule a master assumes the risks occasioned by the use of insufficient and defective machinery which he is under promise to make safe is ignored in each of them.

The appellant requested the court to require the jury to return seven special findings.

We think all of them might well have been refused, as they only called for findings as to evidentiary facts.

Three, however, were submitted and answered.

It is complained that the findings returned by the jury are inconsistent.

Appellants regard the answers returned to the second and fifth questions consistent, and favorable to them. The second finding is, it was dangerous for a person to climb up and down as the plaintiff did while the cog wheels were in motion, and the fifth that the plaintiff knew at and before the time of his injury the cog wheels were uncovered. These facts the appellee admitted, in fact his case proceeded upon the theory they were true.

The question upon which the case turned was not whether the performance of the work while the cog wheels were in motion was free from danger, but whether the danger was so apparent and probable as to render the undertaking reckless.

The appellants had assumed the ordinary hazards of the undertaking unless the risks were such as only one indifferent as to his personal safety would voluntarily encounter.

The jury did not regard the undertaking as free from danger, and so specially found, but they did not feel warranted in saying no one but a reckless person would endeavor to perform it. They thought a reasonably prudent man, relying upon a promise that all possible danger would be soon removed, would not refuse to perform the work for a short interval in the meantime. The special findings were not, therefore, inconsistent with the general verdict.

We think the judgment right upon the merits, and the record free from error of reversible character.

The judgment is affirmed.

**Imri B. Vancil v. Mary M. Hutchinson.**

1. VERDICTS—*When to be Set Aside.*—A judgment upon a verdict which is clearly against the weight of the evidence will be reversed.

Assumpsit, for money had and received. Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the May term, 1895. Reversed and remanded. Opinion filed December 21, 1895.

CONKLING & GROUT, attorneys for appellant.

PATTON, HAMILTON & PATTON, attorneys for appellee.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

This action was commenced October 2, 1893, by appellee, upon the common counts in assumpsit, to which appellant pleaded the general issue. The trial resulted in a verdict for plaintiff for \$1,997, which the court sustained against a motion for a new trial and rendered judgment thereon.

As disclosed by the evidence, plaintiff's claim was for the unpaid residue of \$1,997 of the sum of \$3,000, alleged to have been left for her in defendant's hands by Edmund C. Vancil, who was his father and her father-in-law. Defendant claimed that he received only \$1,003, which amount, it is admitted, he paid to her; and the record presents but little else than the question of fact.

Appellee's first husband, a brother of appellant, died in 1861, leaving a daughter. After twelve or fifteen years of widowhood she married Mr. Hutchinson, her present husband, and has since resided with him in the State of Texas.

Some time in the early part of 1890, Edmund lost his wife, and about a month afterward went to live with appellant, with whom he remained until the 31st day of December, 1891, when, as the result of a fall, he died at the great age of ninety-two years, leaving several children and grand-

children, and a very considerable amount of property in money and notes. He had made a will which had been destroyed—when, how or by whom does not appear, but probably before the death of his wife. No copy of it was produced nor its contents otherwise shown. He had also given to several, if not each of his children, considerable sums of money, among them to appellee, at different times during her widowhood and afterward, the aggregate amount of which she would not attempt to state, even approximately, having kept no account of them, and which no one else appears to have known unless it was the old man himself, who deducted such advances in the cases of others in the final distribution which he made in his lifetime. Her statement, upon strong pressure from her counsel, that she did not receive \$1,997 in all, after such admissions of her ignorance of the amount she and her daughter had received, must be considered of little weight since it would be true if she had received \$1,796.99. It was admitted that by the will he had expressed his intention that appellee should have \$3,000, but whether it was declared to be subject to such deduction was made a question pertinent to the main issue, which was, how much had he intrusted to appellant to be delivered to her.

In the latter part of April, 1890, shortly before the death of his wife, he and his sons, William A. and appellant, were together at his house, selecting from his notes the amounts he intended then to appropriate to several members of his family, respectively, and some other objects of his bounty. On that occasion William did the figuring. Appellant claims that they selected for appellee three notes, amounting to \$1,003, and placed them together in an envelope, which with others so placed for other parties, the old gentleman kept for a time in his own possession to receive payments of interest thereon that should be made before delivery for their intended use. He distributed some notes to appellant and William, and perhaps to some others, within a few days—mostly notes given by them to him—for which he took their receipts; and in June following, assisted by appellant

and in the absence of William, made a further distribution and prepared receipts to be signed therefor by the distributees respectively, as before, but of which also he retained possession.

On the 11th of November, 1891, having been seriously hurt by a fall, and thinking the end was not far, he delivered to appellant for the beneficiaries the notes for the several amounts intended for them, together with the receipts therefor so prepared. We understand it was mostly, if not entirely, in notes, from the proceeds of which appellant was to pay them, though some of it may have been in notes of the parties, to be surrendered. Among them were the three above mentioned for appellee, and which appellant says were all that he ever received from his father for her.

Her claim for \$1,997, to make up the \$3,000 bequeathed to, and alleged to have been intrusted to him for her, and which the jury allowed, rests upon the testimony of her brother-in-law, William A. Vancil, and her nephew, A. C. Moffet, and a statement in a written communication in the name of appellant, to William, and designated in the record as "Exhibit A." Neither of these witnesses, when he testified, May, 1894, was on friendly terms with appellant. Their testimony related almost entirely to verbal admissions and statements, said to have been made by him from two to four years before, only one of which was stated to have been made in the presence of a third person, then living, and that person was not produced. Not one, therefore, was directly corroborated. Appellant positively denied them, in the sense in which they were intended for the jury. They were nearly all in the same language, viz., "that Mary (appellee) was to have \$3,000," without explanation; which of itself would be no evidence that appellant ever received from his father, for her, more than \$1,003, the receipt of which he admitted, and which appellee admitted he paid to her in full. He never denied, but freely admitted and may have repeatedly said, that *by the will* she was to have \$3,000, but he claimed that either by it, or his father's determination after it was destroyed, or by both, that



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amount was expressed to include what she had already received. Moffet, however, also testified that about a month before the old man died, in reply to his question whether he had sent to Mary *the* \$2,000, appellant said he had. And this is supposed to be made intelligible and consistent by the statement of William, on cross-examination, that at the meeting to make some division, in April, 1890, where he was told that by the will Mary was to have \$3,000, and when they "were dividing up the notes," his mother and his father both "said to send Mary her money; we could keep the notes and send her the money; that there was plenty of money on hand to send her;" and that appellant then said, "by God, he would send her but a thousand;" a remarkable declaration, certainly, when we consider in whose presence and of whose money it was said to have been made. The suggestion is that his father asked him if he had sent to appellee the two thousand, as stated by Moffet, in view of this declaration more than six months before, as stated by William, that he would send her but one thousand, showing his understanding that she was to receive \$3,000, and that appellant's answer showed he had received it for her. Appellant denied Moffet's statement, both as to the question and the answer, and that of William as well. He testified that all he received from his father for appellee was the package of notes for \$1,003.13, out of which he was to get the money; that he received them on November 11, 1891, about two weeks before the alleged conversation mentioned by Moffet, and about six before the death of his father; that he was not expected to send her the money before that event, and did not until long after. Her receipts for the amount he sent, being \$500 and \$503, bear date respectively of October 10, 1892, and March 24, 1893.

On his cross-examination William A. Vancil stated that the last time he was at his father's to divide the notes was in April, and might have been the 24th, 1890, and testified, "We did not set off any notes to Mrs. Hutchinson (appellee) that day. I did not make a memorandum in my own handwriting there of the amount to be set off to her, that I

remember of." He was then shown a memorandum as follows—"April 24, 1890. Three (3) notes to Mrs. Mary M. Hutchinson amount to \$1,003.13," and admitted it was all in his handwriting. We refrain from comment on the explanation he attempted to make of it, further than to say that in our judgment, as respects his own credit, it was worse than a failure.

Again, he testified that two or three months after his father's death, he wrote to appellant inquiring about the amounts his father had appropriated to different persons and purposes, as shown by receipts prepared for their respective signatures, and received an answer giving the several amounts, among which was one showing that appellant had received for appellee \$3,000. That is the paper already referred to as one of the supports of appellee's claim. It can be more intelligibly explained after the introduction of some other documentary evidence and will be noticed again in that connection. It is "Exhibit A."

He further testified that after his father's death, having learned that appellant had not paid appellee all that was due to her, he advised her of it, and shortly before this suit was brought she came to visit him. He lived at Waverly, in Sangamon county, and appellant near Modesto, in Macoupin. He took her to appellant's place and demanded of him, for her, the \$2,000, claimed to be still due. Appellant denied it—said that what she had received was all that was coming to her, and asked them both to come into the house and look over the books and papers, but they did not go. He says he had some business in town and was in a hurry to get back. Appellant says that William flew into a passion and threatened to sue him—was going to get out of the buggy and whip him, and said he would whip him the first chance he got; that he tried to pacify him, and did everything he could to get him to come in and examine the books and papers—told him they would satisfy him that he (appellant) was all right, and that if sued he thought he could beat him without a witness.

William and appellee were both afterward called in re-

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buttal, but neither denied the fact nor the urgency of appellant's invitation or the threats he said were made and passion displayed by William.

The foregoing is substantially all of the oral testimony on behalf of appellee. As already observed, it comes from two witnesses, both being biased by personal animosity against appellant, and relates to alleged verbal statements which were separated in time and place, neither of which was directly corroborated and each of which was denied by him. That on behalf of appellant, excepting what was introduced in connection with or relation to the writings, came from himself alone, and is also in substance above set forth. We now turn to the documents.

The memorandum of William A. Vancil, offered as contradicting his oral statement and confirming that of appellant as to the setting apart for appellee of \$1,003.13 at the division of April 24, 1890, has been adverted to. It was picked up by appellant's wife from the table or floor, on that day, after the business was done and the parties had separated.

Next is a receipt taken by his father from appellant, of November 11, 1891, upon delivering to him the several packages of notes the proceeds of which were by the latter to be paid over to the persons respectively named, which is as follows:

"Received of E. C. Vancil, \$10,000 for Mordecai Vancil; also \$3,000 for Mary M. Hutchinson, less \$1,997 that she has already received on the aforesaid \$3,000; also \$500 for Portia Gilkerson; also \$2,500 for Effie Vancil; also \$2,500 for Ida Vancil; also \$2,500 for Ollie Vancil; also \$100 for graveyard, and \$20 for "the church." All of which I agree to pay over according to instructions.

I. B. VANCIL.

EFFIE VANCIL, witness.

November, 11, 1891."

This paper, excepting the signature of appellant, is in the handwriting of his oldest daughter, Effie, now Mrs. Jordan. She testified that she wrote and witnessed it at her grandfather's request, and at his like request read and showed

it to him. He then gave it to her father to sign, and it was put with her grandfather's papers. It was written in his room, on the day of its date, in the presence of her father and grandfather.

An attempt was made on her cross-examination to show that it was dictated by her father. We think nothing was elicited to impair the force of the paper or of her statements in chief respecting it. Her answers seem to be natural and candid. She thought she used in part a receipt which her grandfather had written, but had no very distinct recollection as to that nor as to any dictation; her father may have dictated it in part. The material part is the deduction of previous gifts from the \$3,000 for appellee. It is not probable that appellant knew the amount of those advancements except by information from his father or the fact that notes for only \$1,003 had been set apart for her. If he mentioned the matter and amount (which does not appear) he must have done it in the presence and hearing of his father, to whom the paper was read, shown and delivered as it is, by the witness.

That he knew it and intended to have it so is further shown by the receipt prepared by him and in his own handwriting, to be signed by her when she should get the \$1,003, which is as follows:

"April 30, 1890, received of E. C. Vancil one thousand and three dollars (\$1,003), part of my step-father's estate, and I agree that this shall be a final receipt of all claims against my step-father up to date. This amount is the same as specified in his will, and if I try to break his will, aid or persuade others to do so, I agree to pay back all this money and relinquish all claims to his estate."

Under this appears the following, in the handwriting of appellant's daughter, Ida: "Be sure and return this. It is all my written authority;" which appellant explained by the statement that when he sent to her the draft for \$503, in March, 1893, he directed his daughter to write the letter and inclose a receipt for the amount to be signed by appellee, and also this receipt prepared by his father for the full

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amount, \$1,003, not to be signed by her because she had already receipted for the \$500 sent in October, 1892, and was to sign the inclosed for the residue, but to show her it was all his father left him or intended for her, and to be returned to him. He says he put it in the letter of Ida, and mailed it himself, and that it was returned to him with the receipt, also produced, for the \$503. Appellee denied that she received it with the draft, or ever saw it before the trial, and her letter acknowledging the receipt of the \$503 was not produced. We think the fact, however it may have been, was immaterial. He may have inadvertently omitted it though intending to inclose it. No motive for withholding it is apparent. Its genuineness is fully proved and not questioned. That he actually gave it to Ida to be so sent, as she understood, is manifest from her request underwritten. And the appellee may have received it and forgotten the fact. She never had a suspicion that any more money was left with him for her until so informed, afterward, by William A. Vancil, and therefore the paper was not likely to be regarded by her as important to be remembered.

It appears that some if not all the packages set apart at the first division, April 24, 1890, were delivered to the parties for whom they were intended on or before the 30th. William A. received his at that time and the receipt prepared for him to sign was dated on that day, as was appellee's.

A further division was made in June, at which William was not present. Receipts for these were prepared in like manner, but were all retained by the old man, with the notes, to receive and credit payments of interest thereon, until November 11, 1891, after he was disabled, and about six weeks before his death, when he delivered them to appellant and took his receipt of that date, above set forth.

Some two or three months after his death William A. wrote to appellant for copies of the receipts his father had held, and received in reply the following, which is the "Exhibit A," introduced by appellee: "I do not think it

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will be necessary to copy all these receipts, as they are nearly identical in language, but will give a list of the amounts.

I. B. Vancil.....	\$24,500.00
A. E. Moffett.....	3,002.41
I. B. Vancil, for Mary.....	3,000.00
I. B. Vancil for Mort. (Mordecai, a brother of appellant, in California.....	10,000.00

The list proceeds in like manner, giving the other amounts mentioned in his receipt to E. C. Vancil of November 11, 1891, herein before copied, and others, amounting in all to a little over \$100,000 and then continues: "He gave Burke \$2,500 in cash, for which there is no receipt. \* \* \* I have the notes all just as I received them, and as they have been for the last year. I have his books in which all the notes are listed. Come down some day and I will show you all about it. \* \* \* I hope you will not be foolish enough to take this into court, as there will be nothing in it. Now I believe this is all I think of.

I. B. VANCIL."

The material item in this statement is that of "I. B. Vancil, for Mary, \$3,000." It is conceded that Mary, there named, is the appellee. William testified that the body of the paper was not in the handwriting of appellant, but he believed the signature was. Appellant positively denied it, and was corroborated by his daughter Effie and his son Burke, each of whom also testified that it was in the handwriting of his daughter Ida, and not of appellant. The latter stated that when he received the request he was very busy; that his older daughter, who usually wrote for him if she was at home, was then away; that he placed all the papers in the hands of Ida, and directed her to copy the two receipts from William, and give him a list of the amounts of the others; that she had his receipt to his father of November 11, 1891, and must have taken from it the items with which her statement charges him; that after giving her all the receipts and papers, and the general direction stated, he

went about his business, and never saw or knew of her statement until it was produced on the trial; that he did not direct her to put down in that letter "I. B. Vancil, for Mary, \$3,000;" and closed by saying "the amount of it is she just struck the first amount and never said anything about the conditions." Ida was too ill at the time of the trial to be present.

We perceive nothing in this explanation, of itself or in the light of any circumstances shown, which would justify a reasonable doubt of its truth.

The foregoing comprises substantially all the evidence, and is perhaps set out at unnecessary length. Had the verdict been found upon the oral testimony alone, we should have had no inclination to interfere with the finding. It would have been for the jury to reconcile, accept and reject, as they in their judgment, with their superior advantages, saw fit.

But that which seems to us to be the most convincing by far, is shown by what is more to be trusted than the recollection by witnesses of oral declarations, after the lapse of so long a time, however disinterested and honest they may be. With the correction made, as it fairly should be, of Ida's statement in the letter written in her father's name to William A. Vancil, the documentary evidence is all one way. So far as we see, it clearly preponderates against the evidence of appellant's admissions that he received \$3,000 from his father for appellee, and corroborates his denials of them, and his statement of the material facts generally. The change of a disposition on his part to withhold his father's books and papers from examination by or for appellee, is refuted by the letter of Ida and the testimony of William, assented to by appellee. He had no reason to anticipate a need of these books on the trial. Whether they showed the advancements to appellee, which is all it is said they might have done, was not material to the issue; which was, how much had appellant received for her. He did not state, nor pretend to know how much she had previously received. If his father, upon his understanding or mis-

understanding, stated what it was and therefore left for her only the difference between that amount and \$3,000, then whatever the books might show was the amount charged to her; it could not affect appellant's liability in this case, and that he did so state is conclusively shown by his own writing. There is nothing in the record upon which to found a charge of forgery, fraud or mistake, in connection with that statement. That he acted upon it is further shown, as we think, by the memorandum made by William on April 24, 1890. Excepting his alleged verbal admissions, there is not a particle of evidence that appellant received for appellee a dollar in cash or otherwise besides the notes for \$1,003.13. He must have understood that William knew that was the amount set apart for her, and have presumed that Ida had given him the amount as stated in the receipt of November 11th; and therefore he could hardly have admitted to William or stated to his father in the presence of Moffett that he had received \$2,000 more for that purpose.

It is unnecessary, and might be harmful to comment further upon the oral testimony. Being of opinion that the verdict was clearly against the weight of the evidence, the judgment will be reversed and the cause remanded.

63	642
65	417
63	649
69	164

Cleveland, C., C. and St. L. R. Co. v. A. E. Umphenour.

1. RAILROAD COMPANIES—*Where not Required to Fence.*—A railroad company is not required to fence its track at places where such fence interferes with its own rights in operating its road or endangers the lives and limbs of its employees, or where the convenience of the public in dealing with the company requires such place to be kept open.

Action for killing domestic animals. Appeal from the Circuit Court of Vermilion County; the Hon. EDWARD P. VAIL, Judge, presiding. Heard in this court at the May term, 1895. Reversed and remanded. Opinion filed December 21, 1895.

H. M. STEELY, attorney for appellant.

It is not sufficient for plaintiff to show that the animals



## C., C., C. &amp; St. L. R. R. Co. v. Umphenour.

were killed at a point where the railroad company was required to fence; he must show and prove by a preponderance of the evidence that the animals entered upon the right of way at a point where the railroad company was required to erect and maintain fences or cattle-guards. The place where they were struck or killed is immaterial. They may have got on at one of the excepted places. *G. W. R. R. Co. v. Morthland*, 30 Ill. 451; *M. & O. R. R. Co. v. Moore*, 34 Ill. App. 519; *Bremmer v. G. B., S. P. & N. R. R. Co.*, 61 Wis. 114; *Snider v. St. L., I. M. & S. Ry. Co.*, 73 Mo. 465; *W., St. L. & R. Ry. Co. v. Treets*, 96 Ind. 450; *Morrison v. N. Y., etc., R. Co.*, 32 Barb. (N. Y.) 568; *L. E. & W. Ry. Co. v. Kneadle*, 94 Ind. 454.

Notwithstanding the statute, it has always been held in this State, and in other States under similar statutes, that railroads are not required to fence their station and depot grounds and places where it is required to be open for the convenience of the public, even though not within the limits of an incorporated city, town or village, or at a highway crossing. *C., B. & Q. R. R. Co. v. Hans*, 111 Ill. 114; *L. E. & St. L. C. R. R. Co. v. Scott*, 34 Ill. App. 635; *C., C., C. & St. L. Ry. Co. v. Abney*, 43 Ill. App. 92; *T., St. L. & K. C. R. R. Co. v. Franklin*, 53 Ill. App. 632; *C., C., C. & St. L. Ry. Co. v. Myers*, 43 Ill. App. 251; *C., C., C. & St. L. Ry. Co. v. Roper*, 47 Ill. App. 320; *T. H. & I. R. R. Co. v. Bowles*, 16 Ill. App. 261; *I. C. R. R. Co. v. Williams*, 27 Ill. 48; *G. & C. N. R. R. Co. v. Griffin*, 31 Ill. 303; *T. W. & W. R. R. Co. v. Chapin*, 66 Ill. 504; *T. W. & W. R. R. Co. v. Spangler*, 71 Ill. 568.

Where animals get upon track at a point where the company is not required to fence, plaintiff can not recover unless it is shown that the injury resulted from a want of ordinary care upon the part of the servants of the company. In other words, there must be proof of negligence. *P., D. & E. R. R. Co. v. Dugan*, 10 Brad. 233; *I. C. R. R. Co. v. Bull*, 72 Ill. 537; *G. W. R. R. Co. v. Morthland*, 30 Ill. 457; *C. & N. W. R. R. Co. v. Barrie*, 55 Ill. 227; *I. C. R. R. Co. v. Phelps*, 29 Ill. 447.

The company is not required to fence its road or put in

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cattle guards at such places where to fence would interfere with its own right in operating its road or transacting its business, nor where the rights of the public in doing business with the company would be interfered with, nor where such fencing would imperil the lives of its employes. R. R. Co. v. Oestel, 20 Ind. 231; Ry. Co. v. Rowland, 50 Ind. 349; Ry. Co. v. Crandall, 58 Ind. 365; R. R. Co. v. Wood, 82 Ind. 593; R. R. Co. v. Willis, 93 Ind. 507; R. R. Co. v. Chapin, 66 Ill. 504; McKinley v. R. R. Co., 47 Iowa 76; Ewing v. R. R. Co., 72 Ill. 25; Tracey v. R. R. Co., 38 N. Y. 433; Swearingen v. R. R. Co., 64 Mo. 73; L. E. & W. Ry. Co. v. Kneadle, 94 Ind. 454; Ft. W. & C. R. R. Co. v. Herbold, 99 Ind. 91; P. R. R. Co. v. Mitchell, 124 Ind. 473.

Where fence is needed on but one side, or it is only practicable to fence on one side of a railroad, no fence need be erected on the other, and the railroad company is not liable under the statute. I., B. & W. Ry. Co. v. Leak, 89 Ind. 596; W., St. L. & P. R. R. v. Nice, 99 Ind. 152.

M. W. THOMPSON, attorney for appellee.

The statute of this State requires all railroad corporations, within six months after any part of its line is open for use, to erect and thereafter maintain fences on both sides of its road, suitable and sufficient to prevent stock from getting on their road, except at certain points, and it is not claimed that this is one of the excepted points, and the Supreme Court says: "The courts would be reluctant to enlarge by construction the number of excepted places; most certainly, unless where the literal application of the statute would work such great public inconvenience, it would be held the legislature could not have intended it should apply." C., M. & St. P. R. R. Co. v. Dumser, 109 Ill. 407; St. L. & S. E. Ry. Co. v. Casner, 72 Ill. 385; C. & A. R. R. Co. v. Engle, 84 Ill. 397.

OPINION PER CURIAM.

The question here is whether the railroad company was required to maintain a fence at the point where the plaintiff's horses came upon the track. According to the proof

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the railroad runs along the south side of an unincorporated village. The depot building, water tank, stock pens, grain elevators and switches are all situated within a space that is unfenced. According to the uncontradicted proof so much of that space as lies between Griggs street and Main street extended across the railroad, which includes the place where the animals came on the track, is necessarily required for the purposes of transacting the business of the road in receiving and discharging freight and in switching cars. The testimony is not conflicting on this point nor on the point that a cattle guard with wing fences within this space would seriously endanger the employes of the company in doing the switching work constantly required there.

In the case of C., B. & Q. R. R. Co. v. Hans, 111 Ill. 114, it was held that the company was not bound to fence so much of its track at stations not within incorporated municipalities as is required to be open for the convenience of the public in dealing with the road. This ruling has been followed by the Appellate Courts in many reported cases. T., St. L. & K. C. Ry. v. Franklin, 53 Ill. App. 632, and cases cited. The controlling consideration as stated in those cases, is the necessity arising from the relations between the company and the public, and the right of the latter to have convenient access to the road at stations.

In the case of C. & E. I. R. R. Co. v. Guertin, 115 Ill. 466, it was sought to show that the safety of employes required the space to be left open and error was assigned upon the exclusion of offered proof to that effect, but the court found it unnecessary to pass upon the question and it was not directly decided. In E. & T. R. R. Co. v. Willis, 93 Ind. 507, the point was directly before the court and it was held that under such circumstances a fence was not required. It was said to be well settled law that a railroad company is not required to fence its road when such fence interferes with its own rights in operating its road or in transacting its business, nor when the rights of the public in traveling or doing business with the company are interfered with, and that if the company is not required to fence when its rights in running trains or transacting its business are thereby

infringed there is greater reason for holding that it should not be required to fence where the lives and limbs of employes would be thereby endangered. We are not prepared to hold that the mere inconvenience of the company in operating its road or in performing its immediate duties to the public would excuse it from building a fence required by the statute, or that such consideration would warrant a construction of the statute to that effect. It does, however, seem clear that in ascertaining what portion of its grounds at stations should be left open in order to enable it to properly perform its duty to the public and to enable the public to fully enjoy the facilities for which the road is designed, it is proper to consider what the company must do in that regard in the course of receiving and discharging freight and in handling and switching cars. Such work is constantly necessary and as is well known is, at best, hazardous to employes. This hazard is substantially increased by the presence of cattle guards. It is therefore but reasonable that in ascertaining what space should be left open the safety of employes must be taken into account. When the duty of the company to the public is being considered there is also involved a duty it owes to employes to use reasonable care in providing them with safe and sufficient means and appliances for doing their appointed work, and this can not be disregarded in determining the point under consideration. Therefore in arranging the switching yards the company may properly keep in view the safety of the employes, and this is an element to be regarded in ascertaining how much space may be left open in order that the company may duly serve the public.

Proof on this point went to the jury without objection in the case at bar, and was without contradiction, but the court struck out all reference to it in the instructions.

We feel constrained to hold that, as the record appears, the verdict is clearly opposed to the evidence, and probably the jury did not apprehend what weight of importance, if any, should be given to the element of safety in locating cattle guards and wing fences.

The judgment will be reversed and the cause remanded.

**City of Danville v. Maurice Mitchell.**

1. PRACTICE—*Executions Against Municipal Corporations.*—An award of execution against a municipal corporation in a judgment is an error for which the judgment will be reversed and the cause remanded with directions to the clerk of the court below to amend it by striking out the clause awarding such execution.

**Trespass on the Case**, for injuries to domestic animals. Appeal from the Circuit Court of Vermilion County; the Hon. FERDINAND BOOK-WALTER, Judge, presiding. Heard in this court at the May term, 1895. Affirmed in part, etc. Opinion filed December 21, 1895.

G. F. REARICK, attorney for appellant.

LAWRENCE & LAWRENCE, attorneys for appellee.

MR. JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

Appellee recovered judgment below on a verdict for \$160 damages for injury to his property, alleged to have been due to a defect negligently left in the crossing of a sidewalk from Main street to the freight yard of the Wabash railroad in the city of Danville. All motions were made and exceptions taken to bring the whole case here by the city's appeal.

Until a short time before the accident the street had never been improved. The crossing was of plank, sloping gently for three or four feet to the outer edge of the sidewalk, and thence with a like easy descent to the street by means of a culvert in the ditch. Very heavy loads were hauled to and from the freight yard over it without difficulty. But when the street, some time during the administration of 1891-3, was paved and curbed, the culvert was removed and the descent from the curb, which was perpendicularly from six to twelve inches according to the witnesses, was made much shorter and steeper—almost abrupt.

While in that condition, about three o'clock in the afternoon of the 28th of April, 1893, a son of appellee, with a wagon and team of matched mules was hauling two large

stones from a flat car in the yard to the Gilbert street bridge, several blocks distant. They weighed from 1,500 to 2,000 pounds, and were set in a proper rock frame on the wagon. The team was gentle, and driven carefully. The driver, sitting on the back stone, did not observe the abruptness of the descent from the sidewalk until it was too late to turn and impossible to back. The sudden fall of the fore wheels caused the forward stone to slide out, falling upon one of the hind legs of a mule and so breaking and crushing it as to require that the animal, shown to have been worth \$160, should be shot—which was done. The wagon was also broken, and was repaired at a cost of \$17.50. No complaint is made of the amount of damages awarded; but the city denied its responsibility for the condition of the crossing, and insisted that if so responsible it had been guilty of no negligence, and the injury was due to a want of proper care on the part of appellee and his driver.

In addition to evidence showing that the city had originally constructed the crossing and reconstructed it time and again, and that it was freely and largely used by the public, the court permitted proof that since the accident a brick crossing was laid there by the railroad company, under and according to the city's direction. Without this the evidence was ample to show it assumed and exercised control in respect to its construction and repair. We see no error in the ruling or in the matter of instructions, certainly none that was material. For the rest this whole case was in questions of pure fact for the jury. With their finding we are quite satisfied.

It appears that in writing up the judgment, the clerk, probably from the mere force of habit, added the usual clause for execution. Had it been noticed below the court would doubtless have caused it to be corrected as a clerical misprision. But it was error, for which the judgment will be reversed and the cause remanded with directions to amend the judgment by striking out that clause at the cost, for such correction only, of the appellee. In all other respects it will be affirmed.

Affirmed in part, and in part reversed and remanded with directions.

## Wm. H. Conkling v. F. H. Olmstead.

68	649
d108	159

1. **ALTERATION OF INSTRUMENTS—*Pleading and Proof.***—Proof that an instrument has been altered is competent under a plea denying the execution thereof, but if the alteration is not so apparent on the face of the instrument as to demand an explanation, it may, upon proof of its execution, be admitted as evidence, leaving the defendant to show wherein such alteration consists.

2. **ERROR—*Of which a Party can not Complain.***—A party litigant can not complain of an error which tends to his own advantage.

**Assumpsit**, on a promissory note. Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the May term, 1895. Affirmed. Opinion filed December 6, 1895.

## STATEMENT OF THE CASE.

Assumpsit by appellee against appellant. The declaration contained but one count, which declared specially upon a promissory note alleged to have been given by appellant to one Culp, and by the latter indorsed after maturity to the appellee.

The appellant pleaded the general issue and a special plea denying the execution of the note. The appellee added a *similiter* to the general issue and traversed the special plea.

The only real issue between the parties was that made upon the special plea.

While this plea purported to deny the execution of the note, the only evidence introduced to support it was intended to show the note had been altered after delivery so as to convert it from a non-interest bearing to an interest bearing obligation.

The appellee conceded such alteration had been made by Culp, the payee, and introduced testimony tending to show Culp had changed it by authority given him by the appellant. Appellant denied he had so authorized the change. It appeared without dispute the appellee knew

the alteration had been made before he bought the notes. The only issue presented to the jury was whether the alteration was made by authority.

The instructions asked and given for the appellee and those asked by the appellant, as modified by the court, presented but the one question—whether the appellant authorized Culp to make the alteration, and directed the jury the change was material, and their verdict should be for the appellant, if the change was without authority from him, otherwise for the appellee.

The jury returned following verdict:

“We, the jury, find the issues for the plaintiff, without interest or damage.”

The court refused to receive it, and the jury returned a verdict for the plaintiff assessing his damages at \$200, which was the amount of the note without interest.

Appellant's motion for a new trial was overruled and judgment entered upon the verdict.

CONKLING & GROUT, attorneys for appellant.

MCGUIRE & SALZENSTEIN, attorneys for appellee.

MR. JUSTICE BOGGS DELIVERED THE OPINION OF THE COURT.

The alteration made no apparent change in the face of the note. The plea did not allege any specific alteration, and while the current of authority is, proof an instrument has been altered may be received under a plea denying generally its execution, yet in such state of pleading the plaintiff, if the alteration is not so apparent upon the face of the instrument as to demand explanation, may, upon proof the signature is that of the defendant, introduce the instrument in evidence, leaving it to the defendant to disclose by testimony the change.

The burden of proof sustaining the instrument against the charge it had been changed, rests, upon the whole evidence, with the plaintiff.

Therefore the court did not err in allowing the plaintiff



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Albright v. Timm.

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to introduce the note after proof that it bore the genuine signature of the defendant was produced.

The evidence and the instructions presented but one question to the jury, whether the alteration had been made by authority of the appellant. The evidence upon that issue was conflicting and its determination depended most largely upon the weight and credit accorded the testimony of the appellant and Culp, the payee of the note, who testified in direct opposition to each other.

Therefore the judgment, unless something exceptional appears to take it out the well settled rule governing in such state of case, must be affirmed. It is urged the verdict, which denied the allowance of interest, is radically inconsistent with the view the jury determined from the evidence the change was authorized.

But that was the only issue raised by the pleading or the evidence, and the court expressly directed the jury they should find for the plaintiff if they determined the change was made by authority, and should find for the defendant if the change was unauthorized.

They refused to find for the appellant but found against him.

The verdict may be illogical, but it is so only because the appellee was not awarded the full amount of damages that ought have followed the finding. The evidence introduced to show authority to alter the note disclosed partially the consideration therefor, and this no doubt induced the jury to refuse interest.

There is no error to which appellant may object. Judgment affirmed.

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**Samuel Albright v. F. Timm.**

1. VERDICT—*When Not to be Set Aside.*—A verdict not manifestly against the weight of the evidence, will not be set aside.

Assumpsit, on a promissory note. Appeal from the County Court of Vermilion County: the Hon. J. G. THOMPSON, Judge, presiding. Heard

in this court at the May term, 1895. Affirmed. Opinion filed December 6, 1895.

SALMANS & DRAPER, attorneys for appellant.

E. R. E. KIMBROUGH and JAMES A. MEERKS, attorneys for appellee.

OPINION PER CURIAM.

Assumpsit, on a promissory note. Trial, upon the single issue of payment, resulted in a verdict and judgment for defendant. Plaintiff, by this appeal, brings here for review a record presenting no other than the question of fact.

We have reviewed it thoroughly enough to see that it was eminently a question for the jury, and that they could hardly have determined it without considerable discussion and careful weighing of the conflicting evidence. Although the witnesses were not many, and the positive testimony bearing upon the issue was brief, yet these, with the corroborative circumstances in proof, furnished occasion for the application of all the tests by which the credibility of witnesses and weight of evidence is usually determined. The proper result of their application in this case is all that is considered in the arguments here, and able counsel are alike confident of the soundness of their respective conclusions. No imputation is made against the intelligence or disposition of the jury, nor any complaint that they were misled by any error of the court, and after further consideration by the judge, who also saw and heard the witnesses on the motion for a new trial, their finding was sustained.

We are not prepared to say it was wrong, certainly not that it was so manifestly against the evidence that we ought to interfere. The judgment will therefore be affirmed.

63	652
71	185
63	652
80	50

James O'Connell et al., use, etc. v. John J. Lamb et al.

1. SURETIES—*What Does not Release.*—The fact that the name of the obligee in a bond given to an unincorporated society embracing many thousand members residing in different States was given differently in

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O'Connell v. Lamb.

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the penal part and in the condition of the bond and also in the constitution and by-laws of the society, does not necessarily relieve the sureties where such different designations are intended to indicate one and the same party.

2. *PARTIES—Unincorporated Societies.*—An unincorporated society composed of many persons can maintain an action at law only in the names of all members, however numerous.

Debt, upon a bond. Error to the Circuit Court of McLean County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the May term, 1895. Affirmed. Opinion filed December 21, 1895.

FIFER & PHILLIPS, attorneys for plaintiffs in error.

At common law no suit by or against voluntary unincorporated societies can be maintained, either in the name of the association or of its agents or trustees; such action must be instituted in the name of all its members. But such association may bring a suit, it seems, through an agent properly appointed for that purpose; and likewise, by reason of community of interest, when the members of a voluntary unincorporated association are very numerous, one or more may sue in behalf of all; but in such case the representative capacity must be distinctly and clearly stated in the declaration. 22 Am. and Eng. Enc. of Law, 806-7; Beatty v. Kurtz, 2 Peters (U. S.) 566; Dennis v. Kennedy, 19 Barb. (N. Y.) 519; Wood v. Draper, 4 Abb. Pr. (N. Y.) 322; Beekman Fire Ins. Co. v. 1st M. E. Church, 29 Barb. (N. Y.) 658; Mears v. Moulton, 30 Md. 142; Birmingham v. Gallagher, 112 Mass. 190; Lloyd v. Loaring, 6 Ves. 773; Phipps v. Jones, 20 Pa. St. 260.

J. E. POLLOCK and A. J. BARR, attorneys for defendants in error.

"The contract of suretyship is always strictly construed in favor of the surety, and it can not be extended by implication beyond the clear and absolute terms of the undertaking. The surety is entitled to stand upon the very terms of his contract, and presumptions and equities are not allowed to change or alter the legal obligation." 24 Am. & Eng. Ency., 749, Sec. 9, and note 1.

MR. PRESIDING JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

This was an action of debt on a bond. A general demurrer to the declaration was sustained, and plaintiffs abiding, a judgment was rendered against them for costs, and they bring the case here by a writ of error.

Lamb, the principal, was not served with process and did not appear. The other defendants in error were the sureties. The bond, dated July 9, 1892, was given to an unincorporated society embracing many thousands of members, residing in different States, named in the penal part as the "International Association of Machinists of North America," but in the condition three times as the "International Association of Machinists," while in its constitution and by-laws, as the declaration avers, it calls itself the "Grand Lodge of the International Association of Machinists." It further avers that the association, under its constitution and by-laws, ever since its organization in 1886, had held annual conventions, at which all its members were represented by delegates, and that such conventions exercise, when in session, all the executive powers of the society; that at such a convention, in regular session on May 11, 1892, a constitution was adopted, of which Sec. 4, of Art. 3, was as follows: "All the executive powers of this lodge, when not in session, shall be vested in its executive board, which board shall consist of the grand master machinist and seven trustees," \* \* \* who are to be "elected annually by the convention," \* \* \* which provisions have ever since remained in full force and effect; that at such annual convention, the plaintiffs, on May 9, 1893, were regularly elected—James O'Connell as grand master machinist and the others as the seven trustees, constituting said executive board, and which they still constitute; that the constitution also provided for the election of a treasurer of the society, prescribed his duties and required a bond for their faithful performance; that John J. Lamb was duly elected such treasurer and gave the bond in suit, and as such treasurer received the money sued for, which upon

the election of his successor he failed to pay over according to the condition of said bond; and that because the members of the society are too numerous to be made parties by name, plaintiffs, by virtue of their membership and the power given them by the constitution as the executive board, bring this suit for the use of all the other members as well as of themselves. It avers the identity of the society they represent with the one variously named in the bond and of which said John J. Lamb was treasurer.

The grounds upon which the declaration was claimed to be insufficient and the demurrer thereto said to have been sustained, were that it sought to enlarge the liability of the sureties beyond the terms of their contract, and failed to show any legal right in the plaintiffs to maintain the action as brought.

It is said to be attempted in the declaration, by averment, to substitute in the bond another and entirely different obligee. As a matter of fact that would depend on the truth of the averment, which is that the different designations of the obligee in the bond and declaration were intended to indicate one and the same party. It is a voluntary, unincorporated association, and therefore has no legal name. The bond itself uses two designations for what it must be presumed to intend as the same party, unless the words "of North America" were used not as part of its designation, but to show its locality. Being "international," it may have taken in Mexico and the Dominion of Canada, but confined to North America.

However that may have been, it appears that the association in its constitution calls itself by the still different designation of "Grand Lodge of the International Association of Machinists;" and the averment, in effect, is that this is the name of the association—that the words "Grand Lodge" in that connection are not used to designate a particular tribunal of the association. Now while proper names are a proper means of identifying persons and parties, and may be *prima facie* sufficient for that purpose, they are not conclusive. Several parties may rightfully bear the

same name, and the same party may commonly go by several names. The latter is especially common with corporations and unincorporated societies. In *Chadsey v. McCreery*, 27 Ill. 253, the fact in relation to corporations was strikingly noticed, and from 1 Kyd 237 is quoted, "As the name of a corporation frequently consists of several words, the transposition, interpolation, omission or alteration of some of them may make no essential difference in their sense." The body of each of the names here is the same—The International Association of Machinists. If the added words of "North America," as they first appear in the bond, are to be taken as part of the name, we think it must be presumed that by that repeatedly given in the condition, without them, a different party could not have been intended. And if the words "The Grand Lodge of," prefixed in the constitutional name, unexplained, would import another body, does it present any other than a case of latent ambiguity in the bond as respects the obligee? This, we think, is quite a different question from the one presented in *Trustees of Schools v. Otis et al.*, 85 Ill. 179, cited by counsel. The averments in this declaration do not contradict the bond, nor propose the making of a new contract, but to identify the party for whose use the suit is brought with the obligee in the bond, whose treasurer Lamb was, and whose money he is charged with embezzling, and so remove a doubt raised by matter *dehors* the bond. Appellees' counsel have not cited any case upon the question, and we are not prepared to hold upon principle that this is not such an ambiguity as may be met by averment and proof, even as against sureties.

But upon the other ground stated we are of opinion that the demurrer was properly sustained.

The declaration shows that the obligee named in the bond is an unincorporated society, composed of many persons, of whom a few bring this action at law, on the bond, in their own names for the use of all the members. By the rule at common law this is forbidden. It can be maintained only in the names of all, however numerous. There is no

County of Madison v. Haskell.

authority, so far as we are advised, for supposing that it has been abrogated or modified in this State. We have considered the cases specially cited, but time would not permit even a cursory examination of the many noted in 22 Am. & Eng. Enc. of Law, 806-7, and appended to the case of Phipps v. Jones, 20 Pa. St. 260, as reported in 59 Am. Decisions, 711. It must suffice to say that we discover no difference of opinion as to the common law rule, and that such of the cases as were not in equity, where it is different, were under statutes, expressly authorizing them. If the law of Illinois did not empower the plaintiffs to maintain this action in their own names alone, of course the constitution of the association could not do it. Judgment affirmed.

County of Madison v. William A. Haskell.

	63	657
	64	99
63	657	
115	547	

1. COUNTIES—*Liable for Aid Furnished to Persons Injured.*—A physician who renders medical aid to persons injured by an explosion when the emergency is such as to warrant an immediate action without waiting to confer with the proper officials, may recover of the county a reasonable compensation for his services.

**Assumpsit**, for services rendered. Appeal from the Circuit Court of Jersey County; the Hon. GEORGE W. HERDMAN, Judge, presiding. Heard in this court at the May term, 1895. Affirmed. Opinion filed December 6, 1895.

E. B. GLASS and KROME & TERRY, attorneys for appellant.

ALEXANDER W. HOPE and HENRY S. BAKER, JR., attorneys for appellee.

MR. PRESIDING JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

About nine o'clock in the forenoon of January 21, 1893, a passenger train of the C., C., C. & St. L. R. R. Co., ran into an open switch, striking some freight cars standing on it at

Wann station, which is in Woodriver township, adjoining that of Alton, and within a few miles of the city. Among the freight cars were several carrying tanks of coal oil and gasoline. By the collision the engineer was killed, some passengers injured and some cars, both freight and passenger, set on fire. The accident drew a crowd of people from Alton and the neighborhood to the scene. About noon one of the tanks exploded, and the burning oil was thrown upon the people standing around as spectators, by which quite a number were fatally and others severely injured. Appellee, who was the physician and surgeon of the railroad company for Alton township, was there attending professionally to passengers who had been hurt by the collision, and with other physicians immediately proceeded to render the medical and surgical attention required for the persons who were injured by the subsequent explosion. He ordered and obtained from the company a special train and had twenty of the sufferers conveyed to St. Joseph's Hospital at Alton, of which he was the regular physician and surgeon, and where they were thereafter attended by him and four other physicians. Six of these patients died of their injuries in the course of the first night and following day. Others died later, from the same cause, and still others were, from time to time, discharged. By the 12th of March, only seven remained under treatment. Until that time five physicians had regularly attended to those still there, but after that day only two, appellee and Dr. Halliborton, who continued to do so until the 14th day of June, 1893.

For these services and materials furnished in connection with them, appellee brought this suit in the Alton City Court, from which the venue was changed by agreement to the Circuit Court of Jersey County, where on trial without a jury he obtained a finding and judgment for \$611.50, which included \$78 for materials furnished.

The action was brought under Sec. 24 of the Pauper Act, which provides that "when any non-resident, or any person not coming within the definition of a pauper, of any county or town, shall fall sick, not having money or prop-



erty to pay his board, nursing and medical aid, the overseer of the poor of the town or precinct in which he may be, shall give or cause to be given to him such assistance as they may deem necessary and proper, or cause him to be conveyed to his home, subject to such rules and regulations as the county board may prescribe, and if he shall die, cause him to be decently buried." R. S., Ch. 107.

The declaration was in two counts, of which the first, after stating that the persons named, who were not paupers, but were unable to pay, etc., fell sick in the county of Madison, and that thereupon the overseers of the poor in the townships of Woodriver and Alton by virtue of the statute had undertaken to provide them with such medical attendance and medicines as were necessary and proper, averred that the plaintiff, "being requested and authorized so to do, did furnish to said parties such medical attendance and medicines," etc. The second, after stating the names and conditions of the parties as in the first, averred that in said county they "became and fell sick, and it became necessary to immediately furnish to said parties medical attendance and advice and medicines; that plaintiff, who is a regularly licensed physician, thereupon gave to said parties" such as they required, and that \$800 was a reasonable charge therefor.

The plea was the general issue, with notice of intention to prove under it, in substance, that the parties named were injured by the explosion of oil tanks on a side track of the C., C., C. & St. L. R. R. Co., in Woodriver township; that on the same day they were removed to the hospital in Alton township; that the county supervisors had a competent physician to furnish, free of charge, the medical services required for them in Alton township, who was in said township during all the time of their alleged treatment; that plaintiff was during all that time the physician of said railroad company, and that his services in the premises were rendered on its behalf; that the survivors of those parties and the representatives of the deceased are prosecuting it for damages sustained by reason of said injuries; that said

parties were transferred by it from Woodriver to Alton township; and that plaintiff had been paid for all his services and medicines for which the defendant is in anywise liable by law to pay.

On the part of the defendant no evidence was offered, but the case was submitted on that introduced by plaintiff, and certain propositions of law asked to be held by the court.

It is insisted that no recovery could properly be had under the first count for want of proof that plaintiff was "requested and authorized" to furnish medical attendance, advice and medicines as alleged; and if it could under the second, it must be upon the theory that the parties were entitled to call upon the county for relief and that the urgency of their need did not admit of delay until request could be made of those appointed by law to furnish it, in which case the liability would be only for what was rendered and furnished until the proper authorities could be called upon to act. And it is contended that under this section, the overseer of the poor is the only person authorized to furnish the aid provided for, and he, only in accordance with the rules and regulations prescribed by the county board; for which proposition some cases are cited relating to the county's liability for aid furnished by private persons, upon their own motion, to technical "paupers." *Rayburn v. Davis*, 2 Brad. 548; *Seagreaves v. City of Alton*, 13 Ill. 372. We think that whatever bearing they have upon this case, which is brought under another provision, made for those who are not paupers, is clearly in support of appellee's claim as it is shown by the evidence. For they both except extreme cases, and if this was not shown to be one, none ever was or can be.

By the section referred to the legislature made it absolutely obligatory upon the county to make all necessary and proper provision for persons of the classes and in the condition of the sufferers in this case. It can not avoid the liability so imposed, by its own failure to appoint necessary agents or prescribe regulations as to the manner of doing it. *County of Perry v. The City of Duquoin*, 99 Ill.

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County of Madison v. Haskell.

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486-8; County of Christian v. Rockwell, 25 Ill. App. 20. If the defense is that the provision was not made or not furnished in accordance with the rules and regulations prescribed by the board of supervisors, "it is incumbent on it (the county) to show that the county board prescribed reasonable rules and regulations on the subject, and what they were," as was said in the Perry Co. case, cited, pp. 487-8. Here there was no "defiance" by appellee of such rules and regulations, as in DeWitt Co. v. Rice, 91 Ill. 529. It does not appear that the county board of Madison county had prescribed any. At the time of the accident the overseer of the poor of Woodriver, where it occurred, was absent in Texas. Appellee, having finished the work for which he was sent there, was sitting in a passenger car waiting for an engine to go into town. He did not know that any one was injured by the explosion until a little boy came in and told him to come quick. He took possession of a freight car used as an express office, told somebody to run for cotton and buckets of water, and directed that none but those burned should be admitted. "They came in one after another until the car was full, screaming with pain. Some of them were stark naked. Some were burned from their heads to their toes—every particle of the surface burned." He made a temporary dressing and applied it to their burns. Many of them could not stand the shock of the extreme cold, so he asked Mr. Castle of the "Big Four" to give him a train as quick as he could, which was done, and he took them to Alton. He telephoned for the city ambulance, got express wagons and whatever he could get hold of, and had them conveyed to the hospital, where physicians (word having been sent in) were already gathered.

Such was the statement of appellee, and is given in almost his exact words. Any rule or regulation of the county board which would have required a moment's delay on his part, if he had been informed of it, and that the overseer of the poor was within speaking distance, would have been unreasonable, and he unworthy of a place in his profession if he had thought of it before acting. These people were

entitled to medical aid if it could be had, on the instant and at the county's expense. *County of Christian v. Rockwell, supra.*

Appellee's action was sanctioned and approved by the proper authorities as soon as it was known to them—by the overseer of the poor of Woodriver township, immediately on his return from Texas, and by the overseer of Alton township immediately after the patients were brought to Alton. He found the doctors attending to them and sanctioned everything they did; told two of them to "do everything they could to help these people out;" and says, "if there had been more doctors I would have liked it—there wasn't doctors enough."

Appellee's attendance and services continued to be necessary and proper until June 14th. He continued to attend some thereafter, without charge. The charge he made and sued for was reasonable—he says hardly more than one-sixth of the usual charge in like cases, where the patient is treated at his home and able to pay. He did not render any of the service sued for on behalf of the railroad company. It owed these unfortunates no contract duty. He was not directed by the company, nor required by his engagement as its physician and surgeon to attend to them. The evidence of these facts was clear, positive and undisputed.

We think there was no material error in refusing or modifying the propositions of law submitted on behalf of appellant; and if there was, the finding was required by the evidence. The judgment will therefore be affirmed.

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### Fred Schmaedeke v. The People.

1. INTOXICATING LIQUORS—*Sale to Habitual Drunkards.*—The sale of liquor to a person in the habit of getting intoxicated is not authorized as a converse proposition by the act of 1887, which declares that whoever, outside of the incorporated limits of any city, town or village, sells any intoxicating liquors of any kind in any quantity less than five gallons and in the original package as put up by the manufacturer, shall be fined, etc.

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Schmaedeke v. The People.

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2. **CRIMINAL LAW—*Witnesses Whose Names are not on the Indictment.***—In criminal prosecutions the people are not confined to the witnesses whose names are indorsed on the indictment. The court, in the exercise of a sound discretion and with due regard to the rights of the public and the prisoner, may permit such other witnesses to testify as the justice of the case may seem to require.

3. **SAME—*Verdict Need not State the Name of an Adult Defendant.***—The act of June 18, 1891, requiring the jury to find in their verdict whether or not the defendant is between the ages of ten and twenty-one years, and if between such ages to state his age, has no application to adult defendants.

**Indictment.**—Selling liquor to a person in the habit of getting intoxicated. Error to the Circuit Court of Ford County; the Hon. ALFRED SAMPLE, Judge, presiding. Heard in this court at the May term, 1895. Affirmed. Opinion filed December 6, 1895.

F. A. MITCHELL, E. C. GRAY and M. H. CLOUD, attorneys for plaintiff in error.

A. L. PHILLIPS, state's attorney, and C. H. PAYSON, attorneys for defendants in error.

MR. PRESIDING JUSTICE PLEASANTS DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was convicted and sentenced on two counts of an indictment charging sales of intoxicating liquor to one David Sandstedt, who was in the habit of getting intoxicated.

His place of business was just outside the limits of the city of Paxton, where he sold only lager beer, and that only in quantities of not less than five gallons, and in the original packages as put up by the manufacturers. He did not, however, confine his sales to dealers. Sandstedt was a city drayman. He says that two or three times he bought a case of twenty-six bottles, containing five gallons, for his own use, took it home and drank it in the cellar. His own testimony, with that of the city marshal and two others, concurring and wholly uncontradicted, clearly tended to prove his habit as charged.

It is claimed that these sales were authorized by the act

of 1887, which declares that "Whoever shall, outside of the incorporated limits of any city, town or village, \* \* \* sell \* \* \* any intoxicating liquors of any kind in any less quantity than five gallons, and in the original package as put up by the manufacturer, shall, for each offense, be fined," etc. The position taken is that this implies the converse, viz., that whoever shall sell at such place in quantity not less than five gallons and in the original packages, shall not be fined, etc.

Whatever might be the implication otherwise, it clearly might be excluded by other and consistent provisions, as by a statute prohibiting all sales of liquor on Sundays or general election days.

The act relied on is found in the revised statutes as the concluding sections of chapter 43, which is the dram shop law. The indictment here was found under section six of that chapter, which enacts that "whoever, by himself, or his agent or servant, shall sell or give intoxicating liquor to any minor, without the written order of his parent, guardian, or family physician, or to any person intoxicated or who is in the habit of getting intoxicated, shall for each offense be fined," etc. We see nothing to hinder the application of this section to original package dealers more than to licensed dramshop keepers. It does not prohibit the sale by either, one in quantities less than one gallon and the other in quantities not less than five, but does prohibit both from so selling to any person of either class therein mentioned. The right to sell at all, even in the limited quantities respectively stated, depends in the one case upon the license and in the other upon the place of sale and the package of the article, but surely this does not prevent a further restriction to both, having reference to the age, condition and habit of the vendee. *Cruse v. Aden*, 127 Ill. 235; *Dennehy v. The People*, 120 Id. 627.

It appears that names of four witnesses were indorsed on the indictment, including that of Fred Sandstedt. No one bearing either was called on the trial. But David Sandstedt, named in the indictment as the vendee, and three

others, were examined, against objection on that ground by the defendant; and this is said to have been an abuse of the discretion allowed to the court in that matter, but only in going somewhat further in that direction than is known to have been gone in any other case. The rule is established that in criminal prosecutions the people are not confined to the witnesses whose names are indorsed on the indictment, but the court in the exercise of a sound discretion and with due regard to the rights of the public and the prisoner, may permit "such other witnesses to testify as the justice of the case may seem to require." There can be no objection on his part to the prosecutor's waiving the use of any or all whose names are so indorsed, and we know of no rule limiting the number that may be so substituted. If the defendant here was surprised and prejudiced by their admission, it devolved upon him to show it. *Logg v. The People*, 92 Ill. 598; *Gifford v. The People*, 148 Id. 173; *Trask v. The People*, 151 Id. 523. He has made no attempt to show that it did and we see no reason for presuming it. He must have expected the vendee would be called to prove the sale. The only other question of fact in issue was that of his habit, which was largely a matter of opinion or conclusion from particular facts observed. He had lived in Paxton twenty-four years, following a business that exposed him to general observation. Defendant could hardly have expected to contradict the witnesses who were admitted as to the facts, but must have relied on the observation of others at other times and under other circumstances. By their admission, he was not precluded from calling such others as he might desire. He called none on that question; the only witness called on his behalf was himself—rather indicating thereby that he did not make any question as to the habit. He testified that though he knew Sandstedt drank liquor he did not know he was in the habit of getting intoxicated. We can not say the ruling was error.

It is said the verdict is not sufficient to support the judgment because it fails to find "whether or not the defendant is between the ages of ten and twenty-one years," in

conformity with section 10 of chapter 118 of the revised statutes. This point is met by the case of Sullivan v. The People, 156 Ill. 94.

We have considered the several complaints of error in giving and refusing instructions. No authority is cited in support of either of them, and we are of opinion that in each instance the action of the court is sustained by principles too well settled and familiar to require their re-statement here. The judgment will be affirmed.



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